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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1985

CAROLE SHELBY CARNES TUCKER,
Petitioner,

versus

The Honorable WALTER F. MARCUS, JR., FRED A. BLANCHE, JR., JACK C. WATSON, and THE SUPREME COURT OF LOUISIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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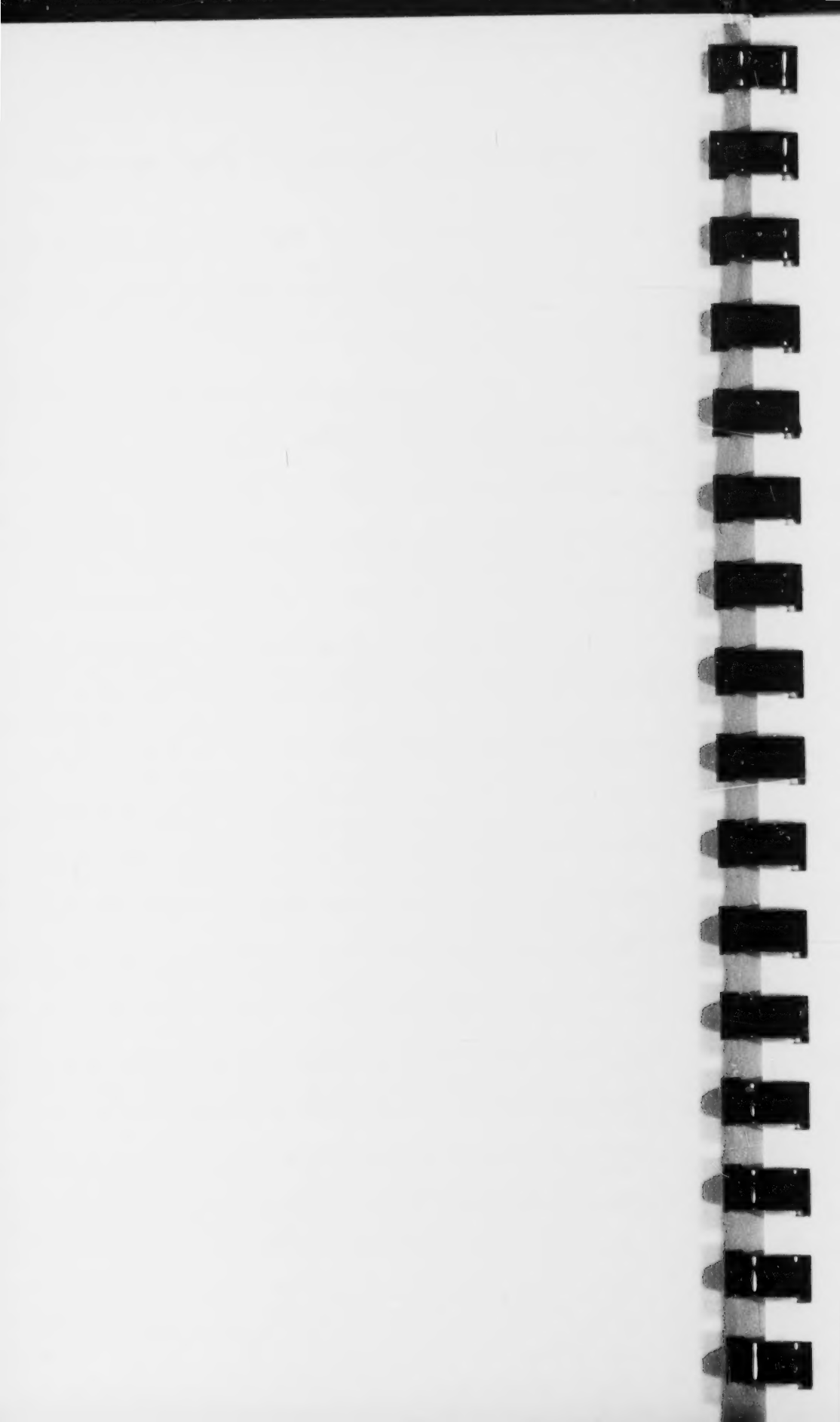
QUESTIONS PRESENTED FOR REVIEW

1. The application of the jurisdictional principles governing federal review of state court actions, as enunciated in *District of Columbia Court of Appeals v. Feldman*, 103 S.Ct. 1303 (1983).

2. Whether the test of 42 U.S.C. § 1988 "prevailing status" is technical or practical? A civil rights plaintiff presents multiple claims, and a federal appeals court grants an unexplained injunction. Defendants consent to further injunctions. The district court grants summary judgment based on some of plaintiff's claims, not reaching her other claims. Defendants do not appeal and, by their actions, moot plaintiff's remaining claims, thus according her "the very relief she sought" in bringing suit. Following a supervening decision of this Court, the district court then rules that both federal courts ex-

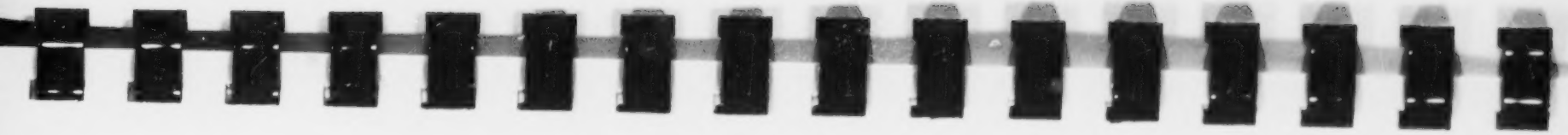


ceeded their jurisdiction in their grant of formal relief, but that they had jurisdiction over the claims that they didn't reach. Does a plaintiff "prevail" in such circumstances?

3. Whether a different panel of a Court of Appeals can treat as invalid a previous panel's unexplained order which is valid on its face?

4. Whether a federal magistrate, without the consent and over the objection of a party, has jurisdiction under FRCP 53(b), 28 U.S.C. § 636(b) or any other statute, to try the substantive civil rights issue of prevailing status in a 42 U.S.C. § 1988 claim arising out of a suit pending before the judge who tried it for 3½ years and comprising a voluminous record?

5. Whether a district judge, who has tried a suit which has pended for 3½ years and comprises a voluminous record, is bound under the "clearly erroneous" rule



to affirm a finding of prevailing status in the suit made by a magistrate who is a stranger to the suit and the record?

6. The procedural due process standards applicable to a proceeding pursuant to a FRCP 53(b) reference to a magistrate. For example, may the magistrate deny orders requested by the parties defining the issues which are before him for determination?

7. Whether it is legal error to conclude that there is no causal *nexus* between a civil rights suit and rule changes alleviating the alleged abuses where the only "evidence" of no causation is incompetent opinion testimony of interested witnesses (that respondents intended to change the rules anyway) which is refuted by substantial evidence, (*e.g.*, 15 months of litigation defending the rules' constitutionality and several federal court orders effectively compelling the changes?)

8. Whether a court that awards relief in respect of some of plaintiff's claims, thus pretermitting her other claims, and forecloses access to this Court by ruling *before the time for seeking this Court's review lapses* that it has jurisdiction over her claims, can tax her with the costs of the suit by retroactively deciding that it acted "improvidently"?

PARTIES TO THE PROCEEDINGS

The real parties to this proceeding are Shelby Tucker, Elliot Snellings, Brian J. Waid and Patrick Breeden, who seek an award of prevailing party attorney's fees, and the State of Louisiana, who would be liable for any such an award under LA R.S. 13:5108.1. The nominal parties to the suit are Carole Shelby Carnes Tucker, petitioner, and Honorables Walter F. Marcus, Jr., Fred A. Blanche, Jr., and Jack C. Watson, and the Supreme Court of Louisiana ("state court"), respondents.

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IN THE

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No.

CAROLE SHELBY CARNES TUCKER

Petitioner,

versus

The Honorables WALTER F. MARCUS, JR., FRED A. BLANCHE, JR., JACK C. WATSON, and THE SUPREME COURT OF LOUISIANA,

Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner, Carole Shelby Carnes Tucker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered 10 March 1986.

OPINIONS BELOW

The Court of Appeals' opinion, 784 F.2d

654 (CA5 1986), is reprinted in the Appendix ("A") at 5-23; the District Court's opinions at A29-51, 58-127.

JURISDICTION

28 U.S.C. §1254 confers jurisdiction on the Court to hear this petition.

PERTINENT STATUTES

The pertinent constitutional provisions and statutes are reprinted at A149-152.

STATEMENT OF THE CASE

Personal circumstances obliged the petitioner, American born but settled in England and trained and practising as a barrister there, to return to the United States in 1979. Louisiana then had a rule prohibiting the licensing of any lawyer who had not graduated from a law school approved by the American Bar Association (the "accreditation rule"), which the state court had never enforced against foreign trained lawyers. In *Application of Anderson*, decided 28 January 1980, the

state court stated:

> "We recognize that the practice of granting exceptions can leave a rule without effect. To avoid this result, we suggest that the proper rule-making committee of the Louisiana State Bar Association study whether the rule should be changed."

377 So.2d 1185, 1187 (La. 1980).

Exempting another foreign trained lawyer from the rule on March 13, 1980, the state court's Chief Justice stated:

> "The rules of this court...were not designed to prevent qualified applicants from taking the bar examination and gaining admission to practice law in Louisiana. Their object was to prevent unqualified persons from taking the bar examination...
>
> "As the rule is written, no graduate of a foreign law school would be eligible to take the bar examination and practice in Louisiana, because the American Bar Association does not investigate, approve or disapprove foreign law schools. ...
>
> "The rules of this court...can be changed by this court, but the best and most responsive way to provide for the admission of new lawyers to the bar has long been thought to be through the organized bar.

> "Until..this court enacts a rule, we are relegated, in order to prevent rank injustice, to the expediency of examining the qualifications of every applicant who seeks relief from the committee's denial."

Application of Faylona, 381 So.2d 1203, 1204-1205 (La. 1980).

These individual evaluations were made as follows. *After* the foreign lawyer passed the bar exam, A49, the state court appointed a commissioner to take evidence and report on the "equivalence" of his legal training to that received at an ABA approved school. It then reviewed the commissioner's report and rendered its order. The Committee on Bar Admissions ("CBA"), an agent of both the state court and the Louisiana State Bar Association ("LSBA"), was a party to these proceedings. Different procedures were used in determining "equivalence". A French lawyer named Lendais retained the governor's brother as his counsel and was admitted to practice

on a showing of letters from law school deans, but other equivalence proceedings were conducted under the State's *disbarment* procedure. Using this procedure, the CBA delayed Anderson's and Faylona's licensing by 16 and 17 months.' A49.

Petitioner applied to the state court for relief from the CBA's denial of her application to sit the bar exam. The state court denied her application 11 days after *Anderson* and 34 days before *Faylona*. Although the CBA's intervention inaccurately traversed factual averments in her petition, the court conducted no hearing and assigned no reasons for its decision.[2] Three of the seven justices dissented.

1. They were certified as having passed the bar exam in September 1978 but were not ordered admitted to practice until January and March, 1980.

2. Two of the justices had stated previously their intention of enforcing the rule against *all* applicants, *Anderson*, 377 So.2d at 1187-88, suggesting that there was no consideration of petitioner's claims.

Justice Dixon stated:

> "Her qualifications are apparently better than any applicant who has petitioned this court to take the bar exam in the last 9 years. We have never denied any applicant with similar qualifications permission to take the examination. We have held that the rule must be changed, and when it is changed, this applicant will be qualified."

Justice Dennis stated that he

> "would grant applicant permission to take the bar examination and continue this court's former practice of allowing persons found qualified by this court to be admitted to practice on a case by case basis until our rules are changed to provide for a fair and systematic method for evaluating graduates of law schools in other nations."

Application of Tucker, 381 So.2d 1203 (La.), *reh. den.*, 380 So.2d 86 (1980) ("*Tucker I*").

These, then, were the conditions that existed when petitioner filed her complaint. The accreditation rule admitted no exceptions: *all* foreign trained lawyers were *deemed* to be less qualified to practice in Louisiana than the least quali-

fied graduate of an ABA approved school. To "prevent rank injustice" the state court permitted them to sit the bar exam, then determined their equivalence. Instead of *ordering* the rule to be changed, the state court delegated the task of determining *whether* it *should be changed* to the LSBA, whose agent, the CBA, appeared to be using the delays, expense and distress inherent in a disbarment procedure to compel compliance with the rule. The complaint, filed 15 February 1980, accordingly, asserted four main claims as *grounds* for relief:

1. The accreditation rule, *as applied to foreign trained bar candidates*, was unconstitutional on its face.

2. Enforcing a rule against petitioner that had already been changed by the State's uniform past practice of "granting exceptions" denied her due process and equal protection.

3. Using a disbarment procedure to determine equivalence denied foreign trained lawyers procedural due process.

4. The absence of procedures guaranteeing hearings of disputed factual issues, the right to call witnesses, etc., in reviewing CBA rejections of bar exam applications was impermissible.

A39-40, 81-82. She sought injunctive and declaratory relief, and *all* relief prayed for was appropriate to *all* of her claims. The basis for federal jurisdiction was 28 U.S.C. §§ 1331, 1343(3) and 2201.

On 21 February the District Court denied petitioner's motion for a temporary restraining order. Petitioner appealed, asserting all her claims in her appeal. A panel of the Fifth Circuit ("the 80-3143 panel") granted relief and remanded for further proceedings. It stated no *grounds* for its injunction. Its presumptively valid order was unexplained. A27-28.

Counsel who had always represented the CBA in state court proceedings, the CBA's chairman, now acted for the defendants in these proceedings. Moreover, the LSBA entrusted him with responsibility for acting

on *Anderson*'s rule study suggestion. A147-148. However, he believed that the rule was valid and didn't require changing and that *Tucker I* had overruled *Anderson*. A128-129. Thus, instead of changing the rule at once, the LSBA opposed six more waiver petitions attacking the rule in state court, while respondents resisted this suit for over a year. They rejected petitioner's offer to stay proceedings to permit opportunity of conducting the rule study, moved for an order impounding her exam results, moved the District Court and the Fifth Circuit to dismiss the complaint, obliged petitioner to obtain an order compelling answers to interrogatories, refused to stipulate uncontroversial facts touching petitioner's legal training, and strongly opposed her motion for summary judgment.[3] The District Court

3. This was only the beginning of what the Court of Appeals has called "a hurricane of paperwork".

ordered them to publish her exam results, A29, and respondents, though under no formal constraint,[4] nevertheless *consented* to two further orders allowing her to repeat the exam. A31, 33. On 6 April, 1981, the District Court granted her summary judgment, ruling that cases involving *domestically* trained candidates, on which respondents (and the CBA in opposing waiver petitions) relied, were inapposite to the question presented

A12. Later, when the District Court dismissed only *some* of petitioner's claims, A90-91, respondents sought an Extraordinary Writ from the Fifth Circuit, contending that the District Court had exceeded its power by ruling on *their* motion. *Compare Hensley v. Eckerhart*, 103 S.Ct. 1933, 1951 (1983) (civil rights defendants have "deeper pockets" and salaried lawyers and may drag out litigation to pressure plaintiffs to "give up" - *per* Justices Brennan, Marshall, Blackmun and Stevens). Having themselves created most of the record of "11 volumes of pleadings and several boxes of documents", A9, respondents then contended that petitioner's attorneys were seeking inordinate fees "to get one foreign-trained woman admitted to the Louisiana Bar".

4. The 80-3143 panel's restraining order applied only to the February sitting of the bar exam. A28.

by the complaint. A42. By grounding its decision on petitioner's equal protection claim, it avoided reaching an "'unnecessary decision on important constitutional issues'". *Maher v. Gagne*, 100 S.Ct. 2570, 2577 (1980). Regarding her attack on the state's disbarment/equivalence procedure, *the most important remaining impediment* to her admission to practice, the Court stated:

> "While we decline to find the present procedures for determining 'substantial equivalence' are unconstitutional, we suggest that any such proceeding which results in a final decision by the defendants on the 'substantial equivalence' question more than six months after the announcement of a candidate's successful completion of the examination may result in such a finding."

A50. The Court thus declared, in effect, that the disbarment/equivalence procedure which petitioner had attacked was presumptively invalid. Respondents did not appeal summary judgment.

The lower courts denied 11 motions con-

tending that the only "review" of petitioner's claims lay in this Court under 28 U.S.C. § 1257, and thereby closed that avenue of "review" to petitioner who relied on their jurisdictional rulings, while the time for appeal to this Court lapsed.

In accordance with the District Court's suggestion, she now re-applied to the state court, which *rejected the CBA's request to adhere to previous practice and apply its disbarment procedure* in determining her "equivalence", A132-133, and, instead, conformed its order appointing a commissioner to the time limits specified by the District Court. A52-54. The commissioner reported that petitioner was "equivalent", A55, and the state court ordered her admitted to practice. *Application of Tucker*, 405 So.2d 506 (La. 1981) ("*Tucker II*"). Petitioner thus obtained "the very relief she sought", as the Dis-

trict Court noted. A86 n.7. She obtained "complete relief" on *all* of her claims and achieved "'the total accomplishment of the aims of the suit'". *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1938 (1983).

At the hearing before the commissioner on 11 June 1981, the CBA's own expert testified that petitioner was *better* qualified than graduates of ABA accredited law schools, and "there was no contrary opinion evidence". A56. It was thus clear that further efforts at preventing her admission to practice would be futile and that the LSBA could enforce neither its accreditation rule nor its disbarment/equivalence procedure against future foreign trained bar admission candidates. Seven *days* later, it appointed a committee ("Task Force") to conduct the study requested *16 months* before in *Anderson*. The *1981 Report of the Louisiana State Bar Association* included an explication:

> "The proliferation of law suits in both state and federal courts attacking the constitutionality of certain requirements and procedures have added to the [LSBA's] routinely heavy logistical work load. A task force has now been appointed to reevaluate the present rules and procedures to alleviate the problems..." A134.

The District Court now granted in part respondents' motion to dismiss, and dismissed all but the first of the claims stated *ante* at 7-8.

Meanwhile, petitioner moved for an interim award of attorney's fees.[5] The District Judge, *sua sponte* and without the parties' consent, referred her motion to a magistrate, who set a hearing for 21 July 1981. Respondents obtained a continuance, then delayed the hearing for another two years by various motions. Petitioner re-

5. Both lower courts found incorrectly that petitioner "began [her] efforts to secure [a fee] award" after she was admitted to practice. A11, 63. In fact, she moved for fees before she was admitted to practice and *before the LSBA appointed the Task Force. See post* at 56 n.16.

quested orders defining the issues in dispute. This was denied. She moved to recall the reference. This was denied. Her counsel (who now lived in England) asked the magistrate to proceed with the hearing, *as required by FRCP 53(d)*. The magistrate informed him that there would be even further delays if he refused to answer *any* question put to him at a deposition. When the hearing did finally occur, the magistrate permitted respondents to take *all* of their witnesses out of turn and adjourned the hearing for another month before counsel finished presenting his case. He then quashed petitioner's subpoenas and converted the adjournment date into a status conference. He then informed counsel, upon arrival for the conference, that he was proceeding with the hearing after all and that there would be another long postponement if counsel did not conclude his case. "We are looking to reschedule this matter

sometime in September or October, not next week."

The magistrate noticed the hearing to be proceeded with in accordance with *Hensley*, which is a case concerned with the *degree*, not the *fact* of prevailing status. The language of FRCP 53(b) ("matters of account") indicated that petitioner's prevailing status was not at issue. The "clearly erroneous" review standard of FRCP 53(e) indicated that the only disputed issues were "matters of account" (because it is inherently absurd to suppose that a judge who has tried a case pending before him for three years, attended all conferences with the parties and is familiar with a large and complex record, is obliged to defer to the factual findings of a magistrate who is a stranger to the case.)[8] Opposing counsel behaved as though the only disputed issues were "matters of account". The denial of counsel's

several requests for a pre-trial order defining the issues thus had the effect of occluding the issues, and the hearing proceeded on the assumption that petitioner's prevailing party status was not in dispute Counsel first learned that this issue *was* in dispute when he received respondents' *post*-hearing memorandum.

The magistrate adopted *ipsissima verba* respondents' post-hearing argument that petitioner had not prevailed because (a) she had only obtained formal relief in respect of claims which had since been dismissed for lack of subject matter juris-

6. There were four changes of magistrate during this litigation. The first heard all the pre-trial motions, then retired. The second presided over the fee proceedings until 21 July 1981, then retired. The case was re-alloted to a third magistrate who announced her intention of retiring. The case was more than three years old, and the record, then comprising more than seven volumes, completely new to the magistrate who found that petitioner had not "prevailed". The Eastern District of Louisiana now has five civil magistrates. Only two were fully active when this case was alloted to him.

diction under *Feldman* and (b) her other claims had not caused the rule changes. A103-109. The District Judge then accepted respondents' argument that the magistrate's causation finding was a factual finding by which he was *bound* under the "clearly erroneous" constraint of FRCP 53(e)(2) and denied fees.

> "'Another view of the evidence [he said] might well have been taken by the fact-finder. The evidence presented by the plaintiffs might warrant the conclusion that their suit and the efforts incident to it were a major factor in effecting the change, but it neither compels that deduction nor makes the contrary conclusion erroneous. We have neither prescience enough nor warrant to justify reassessing the evidence.' *Williams v. Leatherbury*, 672 F.2d at 551." A123.

Petitioner's appeal to the Fifth Circuit was allotted to a different panel which stated that it was "persuaded" that the former panel's restraining order was "improvident", A14-15, did not address petitioner's other contentions as to why she "prevailed", and, "guided by the unequi-

vocal, 'clearly erroneous' mandate of Fed.R.Civ.P. 52(a)", A21, affirmed the District Court's, *i.e.*, magistrate's causation finding and denial of fees.

REASONS FOR GRANTING WRIT

This case presents the following reasons of the kind stated in Rule 17 of this Court for exercising its discretion to issue a writ of certiorari:

1. The Court of Appeals for the Fifth Circuit has rendered a decision which affronts this Court's decision in *Feldman*.

2. There is conflict in the Circuits over both the definition of prevailing status in 42 U.S.C. § 1988 claims and the tests for determining catalytic *nexus* - causation in § 1988 claims mooted by the defendants' actions - issues which have not been but should be settled by this Court. The Fifth Circuit has rendered a decision articulating a definition of prevailing status which appears to misread

this Court's decision in *Hensley*, contravenes the Senate Report's citation to *Kopet v. Esquire Realty Company*, *infra*, and *Thomas v. Honeybrook Mines, Inc.*, *infra*, this Court's decisions in *Webb v. Board of Education of Dyer County)*, *105 S.Ct. 1923 (1985)*; *New York Gaslight Club, Inc. v. Carey*, 100 S.Ct. 2024 (1980); *Maher v. Gagne*, 100 S.Ct. 2570 (1980) and *Smith v. Robinson*, 104 S.Ct. 3457 (1984) and conflicts with decisions of the First, Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits.

3. By *imputing* to an ostensibly valid order of the 80-3143 panel an explanation which does not appear on its face and invalidates the order, the panel below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. It has decided a federal question,

the scope of a magistrate's referral powers, which contravenes this Court's decisions in *La Buy v. Howes Leather Company*, 77 S.Ct. 309, 313 (1957), and *Mathews v. Weber*, 96 S.Ct. 549, 556 (1976).

5. It has so far sanctioned a departure from the accepted and usual course of judicial proceedings in the magistrate's conduct of FRCP Rule 53(b) reference proceedings as to call for an exercise of this Court's power of supervision.

6. It has rendered a decision at odds with this Court's decision in *Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504, 1512 (1985), by affirming under the "clearly erroneous" rule a factual finding supported by no "plausible evidence".

ANALYSIS

CONFLICT WITH FELDMAN

> "...United States District Courts... have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do

> not require review of a final state court judgment in a particular case."

103 S.Ct. at 1317.

The reasoning of the District Court, expressly basing its finding of jurisdiction over petitioner's challenge to the accreditation rule on the above language from *Feldman*, A69, 80-85, applies with equal force to petitioner's attack on Louisiana's disbarment/equivalence procedure. As the District Court noted of the accreditation rule, that procedure was also "adopted by the Louisiana Supreme Court in its rule making capacity on the [LSBA's] commendation", A85, and the state court explicitly acted in a "rule making capacity" in applying it to bar admission proceedings.

> "No procedure is set up for a hearing before the Committee on Bar Admissions;...there is, however, a procedure established for cases involving discipline and disbarment which incorporates all safeguards...This Court, therefore, under its inherent *rule-making power*, has concluded to

> appoint a Commissioner...and in his conduct of said hearing, the Commissioner is to be guided by the [disbarment] procedure delineated in the Articles of Incorporation of the Louisiana State Bar Association..."

Moity v. Louisiana State Bar Association, 121 So.2d 87, 91 (La. 1960) (emphasis added). The procedure was general in application, *see* A130-133, and predated and *was not adjudicated* by the state court in *Tucker I.*[7] Petitioner's attack on this procedure was, therefore, a "general challenge to state bar rules", *Feldman* at 1317, "a general constitutional attack on the [state's] scheme," *Howell v. State Bar of Texas*, 710 F.2d 1075, 1077 (CA5 1983), "which [did] not require review of a final state court judgment in a particular case", *Feldman* at 1317, that was not "inextricably intertwined with the state

7. The state court pretermitted the issue by denying her access to the bar exam. Equivalence hearings were conducted only *after* candidates passed the bar exam. A49.

court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar." At 1315 n.16.

In granting summary judgment, the District Court appears to have recognized the general nature of petitioner's claim:

> "Plaintiff...alleges...(3) the procedure employed in determining the substantial equivalence of foreign and domestic credentials is constitutionally impermissible."

A39-40. But in its 14 June 1983 opinion it ruled inconsistently that the claim *was* a challenge "'inextricably intertwined' with the state court's decision in *Tucker I*, A85-86, a clear misreading and, hence, contravention of *Feldman*.

Because the District Court incorrectly found that it lacked jurisdiction over petititioner's attack on the disbarment/equivalence procedure, neither it nor the panel below considered whether she prevailed because she obtained formal relief in respect of this claim or because her

claim was causally related to the state court's actions in *Tucker II* mooting the claim or under principles which this Court has established and clarified in *Smith*, 104 S.Ct. at 3467 n.10; *Maher*, 100 S.Ct. at 2577; *New York Gaslight*, 100 S.Ct. at 2029-31; and *Webb*, 107 S.Ct 1923.

TEST FOR PREVAILING STATUS

The different Circuits have applied different tests for prevailing status, and divergent standards have arisen within the same Circuit. *Compare Kentucky Association for Retarded Citizens, Inc. v. Conn*, 718 F.2d 182, 184-186 (CA6 1983) (requiring success on "the central issue"), and *Kirchberg v. Feenstra*, 708 F.2d 991, 998 (CA5 1983) (has plaintiff gained "anything" from the suit?); *Helms v. Hewitt*, 780 F.2d 367, 369 (CA3 1986) (suit achieved "some relief"), and *Taylor v. Sterrett*, 640 F.2d 663, 669 (CA5 1981) (has plaintiff acquired "primary" relief

sought?); *Hughes v. Repko*, 578 F.2d 483, 487 (CA3 1978) (plaintiff must essentially obtain principal relief sought), and *Fast v. School District of City of Ladue*, 728 F.2d 1030, 1033 (CA8 1984) (*en banc*) (fee due even where relief awarded differs from that sought). *See Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1152 (CA5 1985) (discussing multiplicity of tests within Fifth Circuit); *Institutionalized Juveniles v. Sec. of Pub. Wel.*, 758 F.2d 897, 910-912 (CA3 1985) (discussing multiplicity of tests within Third Circuit).

This Court has recognized without resolving this confusion, *Hensley*, 103 S.Ct. at 1939, 1951, and petitioner submits that this confusion is unnecessary. The reports of both Houses of Congress, S.Rep. No. 94-1011 (1976), H.R. Rep. No. 94-1558 (1976), show that three questions will *always* determine prevailing status:

1. Were plaintiff's civil rights violated?

2. Was the violation redressed?

3. Was the suit necessary to obtain redress?

If so, then plaintiff has prevailed. The cases cited in the reports to show Congressional intent and most cases interpreting Congressional intent since the statute was enacted support this threefold test. *See esp.* Senate Report at 5, *citing Kopet v. Esquire Realty Company*, 523 F.2d 1005, 1007, 1008-9 (CA2 1975) (benefits conferred on parties to state court action by discovery obtained in federal suit *dismissed for lack of subject-matter jurisdiction* entitled plaintiff to fees) and *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 984 (CA3 1970) (suit *dismissed for lack of subject matter jurisdiction* that prodded trustees to collect royalties owed to parties represented by plaintiff entitled it to fees); *New*

York Gaslight, 100 S.Ct. at 2029-31 (fees due for relief obtained in proceedings *integrally related* to district court suit); *Smith*, 104 S.Ct. at 3467 n.10 ("The legislative history makes clear that a plaintiff [asserting] substantial but unaddressed claims reasonably related to [his] ultimate success" is entitled to fees); *Maher*, 100 S.Ct. at 2577.

Courts have generally ruled that "success" is tested by a suit's practical, not its technical outcome. *Kirchberg*, 708 F.2d at 998 (success is a "realistic matter"); *Abraham v. Pekarski*, 728 F.2d 167, 175 (CA3 1984) (test is relief obtained, not success of legal theories); *Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1159 (CA8 1985); *Hennigan*, 749 F.2d at 1149 (fee due if rights conceded before judgment and action is not frivolous); *Helms*, 780 F.2d at 369-370 (fee due though suit dismissed on official immunity

grounds); *Institutionalized Juveniles*, 758 F.2d at 910-12 (party prevailed despite adverse judgment); *NAACP v. Wilmington Medical Center, Inc.*, 689 F.2d 1161 (CA3 1982) (fees owed despite dismissal of suit for lack of standing and plaintiffs' opposition to remedial agreement prompted by court's *sua sponte* order to investigate alleged abuses); *Monahan v. State of Neb.*, 687 F.2d 1164 (CA8 1982) (fee to parent who placed daughter in school through interlocutory order vacated for mootness after daughter graduated); *Sullivan v. Com. of Pa. Dept. of Labor, Etc.*, 663 F.2d 443 (CA3 1981) (fee for practically successful suit dismissed for failure to prove a civil rights "deprivation"); *Hennigan*, 749 F.2d at 1150, 1153 (plaintiffs against whom partial summary judgment awarded nevertheless entitled to fees because they followed court's suggestion and achieved their goal by obtaining pre-

clearance of reapportionment plan from the Justice Department).[8]

By this test, petitioner has certainly prevailed in this suit. First, her civil rights were violated, as both Justice Dixon and the District Court stated:

> "..We have never denied any applicant with similar qualifications permission to take the examination." A24.
>
> "It is clear that plaintiff has been denied equal protection..[and] due process." A48.

Second, these violations were redressed.

Finally, this suit was *necessary* to obtain that redress. Having been twice denied access to the bar exam, petitioner took the bar exam pursuant to an order of the Fifth Circuit, A27, and retook it pursuant to consent[9] orders of the District

8. *Hennigan* would appear to stand on all fours with the instant suit.

9. Consent alone confers prevailing status. Senate Report at 5, House Report at 7. Respondents were under no obligation to consent to these orders. The "appropriate remedy to [parties] aggrieved by

Court. A31, 33. Respondents were unable to impound her exam results because the District Court ordered them to publish those results. A29. Respondents accorded her an equivalence hearing because the District Court declared[10] that "she be permitted the opportunity to demonstrate that her legal education in England satisfies the standards for approval of the American Bar Association." A51. Respondents resisted her claim that their disbarment/equivalence procedure was unlawful, and applied that procedure to another foreign trained lawyer while her motion for summary judgment vigorously attacking this procedure

injunctions lies in interlocutory appeal under 28 U.S.C. § 1292(a)(1)." *Frazier v. Board of Trustees of Northwest Miss.*, 765 F.2d 1278, 1294 (CA5 1985).

10. The district court expressly abstained from issuing an injunction. A50. *Compare* House Report at 7. "A court should still award fees even though it might conclude...that no formal relief, such as an injunction, is needed."

was under submission. A130. The CBA urged them to apply that procedure to petitioner. A132. They applied a *new* procedure to her equivalence hearing, A52, because the District Court declared the presumptive invalidity of their former practice, A50, and she was ordered admitted to practice expeditiously.'' Seven *days* after her equivalence hearing, finally recognizing that they could not prevent her admission to practice and that neither the federal courts nor the respondents would tolerate a repetition of the treatment accorded to her, Faylona, Anderson and others, the LSBA appointed the Task Force that proposed the rule changes that mooted petitioner's attack on the rules. Each *one* of these successes "achieve[d] some of the benefit [that she] sought in bringing

9. Under the procedure branded by the District Court it had taken Faylona seventeen months and Anderson 16 months. A49.

suit". *Hensley*, 103 S.Ct. at 1939. *Each* amounted to "prevail[ing] on an important matter in the course of litigation." Senate Report at 5.

TEST FOR CATALYTIC *NEXUS*

This Court has not articulated a test for determining causal *nexus*, and courts of appeals have tried to fill this void, focusing their efforts on the *cause* and the *form* of the *nexus*. Another concern has been the required *degree* of *nexus*. *See Morrison v. Ayoob*, 627 F2d 669, 671 (CA3 1980) ("[T]he action need not be the *sole* cause...if [it] was a material factor in bringing about the defendant's action...To require some stricter standard of causation would mean that the defendant *could hide his true motivation behind what seems a plausible alternate justification.*") (emphasis added); *Robinson v. Kimbrough*, 652 F.2d 458, 466 (CA5 1981) (suit a "substantial factor" or "significant catalyst"

in effecting change); *Wooten v. Housing Authority of City of Dallas*, 723 F.2d 390, 392 (CA5 1984) (award due if suit made an "important contribution" to improvements achieved).

The Circuits have stressed the importance of event chronology in this analysis, *Honeybrook Mines*, 428 F.2d 985 (cited in Senate Report at 5); *Martin v. Heckler*, 773 F.2d 1145, 1148-49 (CA11 1985) (*en banc*); *Ortiz de Arroyo v. Barcelo*, 765 F.2d 275, 282 (CA1 1985); *Fields v. City of Tarpon Springs, Fla.*, 721 F.2d 318, 321 (CA11 1983); *Posada v. Lamb County, Tex.*, 716 F.2d 1066, 1072 (CA5 1983); *Miller v. Staats*, 706 F.2d 336, 341 n.32 (CADC 1983); *Com'rs Court of Medina Cty., Tex. v. United States*, 683 F.2d 435, 442 (CADC 1982); *NAACP*, 689 F.2d at 1169-70; *Robinson v. Kimbrough*, 620 F.2d 468, 478 (CA5 1980) ("The chronology of these events alone negates the defendants' statement

that a mere informal complaint would have motivated them to modify their conduct"); *Ross v. Horn*, 598 F.2d 1312, 1312 (CA3 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (CA1 1978), and strongly deprecated the value of defendants' assertions that change was "voluntary", particularly where the evidence is within their control, *Ortiz de Arroyo*, 765 F.2d at 282; *Posada*, 716 F.2d at 1072; *Morrison*, 627 F.2d at 671; *Nadeau* at 281. Causation is *presumed* where the court, as here, expressly refrains from formal relief to permit opportunity of remedial action, as shown by the House Report's citation to *Evers v. Dwyer*, 79 S.Ct. 178 (1958); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (CA4 1972); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (CA8 1970). And, in citing *Aspira of New York, Inc. v. Board of Ed. of City of N.Y.*, 65 F.R.D. 541 (SDNY 1975), both Congressional

reports suggest an important indicator of causation is the degree of resistance to plaintiff's suit.

> "It is true...that the decree is on consent...It is also true that defendants resisted fiercely for more than 18 months before what they deemed a change in the law...seemed to generate changes of heart." At 543.

See also Illinois Welfare Rights Organization v. Miller, 723 F.2d 564, 569 (CA7 1983) (continued litigation belied defendants' claim that they acted independently of suit).

Both Senate and House Reports and cases interpreting Congressional intent thus suggest four tests - event chronology, whether defendants control exculpatory evidence, express judicial restraint to permit remedial action, and degree of resistance met - as aids to determining whether this suit was a "substantial", "material" or "significant" "factor" or "catalyst" in *causing* the changes or made

an "important contribution" to the *form* of the changes. All these factors were strongly present in the instant case,[12] and the courts below applied none of them in their analysis of the *nexus* between this suit and the rule changes.[13]

Moreover, the courts below defied Congressional intent and this Court's decisions in refusing to consider the *nexus* between the suit and its *other benefits* - the abolition of the disbarment/equivalence procedure already accom-

12. All witnesses who testified that this suit had little effect on the rule changes were LSBA officers. The LSBA's lawyers defended the suit, and the LSBA defrayed disbursements incurred in defending the suit. The District Judge expressly declined injunctive relief in granting petitioner summary judgment "because we believe that declaratory relief is sufficient", A50, and suggested that petitioner re-apply to the state court. Respondents, represented by the LSBA's lawyers, resisted this suit for 16 months before they capitulated and appointed the rules change Task Force.

13. Her admission to practice completed "the very relief she sought" and mooted her suit, A86 n.7, *not* the *subsequent* rule changes.

plished in *Tucker II* (*compare* A133 and A52-55) and petitioner's admission to practice. A *nexus* between claims dismissed for lack of subject matter jurisdiction but shown to have been valid by related proceedings requires fees. Senate Report at 7, *citing Kopet*, 525 F.2d 1005, and *Honeybrook Mines*, 428 F.2d 981. Success in "integrally related" state proceedings requires fees. *New York Gaslight*, 100 S.Ct. at 2577. Achieving relief on "substantial but unaddressed" federal claims arising from "a common nucleus of operative fact" requires fees. House Report at 4, n.7; *Maher*, 100 S.Ct. at 2577; *Smith*, 104 S.Ct. at 3467 n.10; *McDonald v. Doe*, 748 F.2d 1055, 1057 (CA5 1984). *See also Parham*, 433 F.2d 421 (CA8 1970) (fee due after court withholds formal relief to permit defendants opportunity of acting voluntarily) (cited in the House Report at 8); *Clients' Council v. Pierce*, 778 F.2d

518, 520 (CA4 1985); *Lampher v. Zagel*, 755 F.2d 99, 102-103 (CA7 1985) (fees awarded for state court victory following federal court abstention); *Southwest Marine v. Campbell Industries*, 732 F.2d 744 (CA9 1984); *Wooten*, 723 F.2d at 391 (plaintiff prevails who shows connection between his suit and the "events" that moot his suit); *Sullivan*, 663 F.2d 443 (fees due for suit that was successful only because it prodded plaintiff's union to arbitration proceedings). Petitioner prevailed *irrespectively* of the subsequent rule changes because she acted on the District Court's suggestion that she reapply to state court and obtained relief by that "alternate route", *Hennigan*, 749 F.2d at 1153, after the District Court noted that the issue presented by her attack on the accreditation rule was *res nova* and branded the disbarment/equivalence procedure as presumptively infirm without otherwise reach-

ing those "important constitutional issues". 100 S.Ct. 2577.

INVALIDATING A FORMER PANEL'S ORDER

All the documents on which the District Court relied in its "claims" findings (A81-82) were presented to the 80-3143 panel, and the District Court specifically ruled that it had jurisdiction over petitioner's attack on the accreditation rule, A87, nor did the 84-3355 panel reverse this ruling. A20. A court's jurisdiction over a *claim* confers on it power to grant any *relief* which is appropriate to that claim. If the courts below had jurisdiction over the claim that the accreditation rule was unlawful, as they held (A87, 20) then the 80-3143 panel acted within its power in temporarily restraining the rule's enforcement against petitioner. *I.e.*, its order, which was unexplained, A27, was valid on its face. Doubting its validity, the 84-3355 panel should have

sought an explanation from the 80-3143 panel, or at least explained why the order could not have been valid in any circumstances, instead of which it impliedly imputed to the former panel's order a rationale (that it was based purely on petitioner's equal protection claim over which the Court lacked jurisdiction) that rendered it invalid. A14-19.

As *Frazier* noted, the proper remedy to a party aggrieved by injunction lies in interlocutory appeal. 765 F.2d at 1294. Respondents did not appeal the 80-3143 panel's order, and their subsequent actions mooted petitioner's claims. Interlocutory relief requires an award where a court does not proceed to a determination of the merits of a claim over which it has jurisdiction. *See* House Report at 8 ("entry of any order that determines substantial rights of the parties" deserves fees), *citing Bradley v. School Board of City of*

Richmond, 94 S.Ct. 2006, 2022 n.28 (1974), and other cases; Senate Report at 5 and cases there cited; *Smith v. Thomas*, 687 F.2d 113, 115-116 (CA5 1982) (fee due where preliminary relief leading to action moots claims), and *on appeal after remand*, 725 F.2d 354, 356 (1984) (defendant's capitulation to restraining order required fees); *Monahan*, 687 F.2d 1164; *Intern. Soc. for Krishna Consc. v. Anderson*, 569 F.2d 1027, 1029 (CA8 1978); *Massachusetts Fair Share*, 476 F.Supp., 296-297 (DMass).

LA BUY AND *MATHEWS*

> "..In *La Buy*, the District Judge on his own motion referred to a special master two complex, protracted...cases...The cases had been pending before him for several years, he had heard pretrial motions, and he was familiar with the issues involved. The master...was to hear and decide the entire case, subject to review by the District Judge under the 'clearly erroneous' test...The Court held that on these facts [FRCP 53(b)] reference was not permissible and affirmed the Court of Appeals' supervisory prohibition. *La Buy*, although nearly two decades past, is the most recent of our cases dealing with

> special masters, and our decision today does not erode it."

Mathews, 96 S.Ct. at 556 (footnote omitted).

§1988 was enacted pursuant to section 5 of the Fourteenth Amendment and thus ranks with the Constitution itself. The House Report at 1 states that its purpose is to make the "judicial remedy" of civil rights litigants cast in the role of private enforcers of "the important Congressional policies which [the civil rights laws] contain" (Senate Report at 2) "full and complete". Without such provision, says the House Report (at 1), such rights would be "meaningless". Article III of the Constitution guarantees to such litigants the right to be heard by a United States district judge. This right to adjudication of one's claims by a tenured judge, which is rooted in the *quam diu se bene gesserint* clause of the Act of Settlement, 1701, 12

& 13 Wm. 3, c.2, would appear to be central to our system of justice. It reposes on sound and strong public policy considerations, not least of which is "the need to maintain the confidence of the public in the factfinding process". *Cruz v. Hauck*, 515 F.2d 322, 330 n.14 (CA5 1975).'[14]

Thus FRCP 53(b) specifically limits

14. Unlike masters in the English system, from whom they are derived, acceptance of the office of magistrate does not disqualify the holder from higher judicial office. Three of the judges currently sitting in the Eastern District of Louisiana were magistrates before they received their appointments. The magistrate who heard the instant suit's fee petition became a district judge shortly thereafter. He was supported in his candidacy for the appointment by a senior partner of the law firm from which petitioner's counsel was dismissed during the course of this litigation. *See The New Orleans Times-Picayune*, March 3, 1985, p. A-5. While no doubtful motive is imputed to his conduct of the hearing, the public's interest in ensuring the *appearance* as well as the substance of impartiality in cases which are characteristically unpopular and where political power characteristically vests in the defendant is reason enough to condemn the practice of referring "prevailing status" determinations in § 1988 claims to magistrates.

references to masters to "matters of account...difficult computation of damages [and] upon showing that some exceptional condition requires it." Even then, they "shall be the exception and not the rule". A district court *must* respect these limitations. *Mathews*, 96 S.Ct at 555-56; *Wingo v. Wedding*, 94 S.Ct. 2842, 2848 (1974). A reference violating the Rule's constraints is invalid. *Piper v. Hauck*, 532 F.2d 1016, 1018-19 (CA5 1976). Such references amount:

> "to little less than an abdication of the judical function depriving the parties of a trial before the court on the basic issues involved in the litigation. The use of masters is 'to aid judges in the performance of specific judicial duties...' and not to displace the court."

La Buy, 77 S.Ct. at 313 (citations omitted).

> "This restrictive policy is necessary because ...the master's findings must be accepted unless they are clearly erroneous [and] involves the danger that the master,

> not the court, will in fact decide the case."

Wright & Miller, Federal Practice & Procedure: Civil § 2605.

The issue of prevailing status is not a "matter of account" or "difficult computation of damages", nor was a "showing" made that "some exceptional condition require[d]" the reference. *La Buy* held specifically that the need for an accounting does not justify referral of *other issues* to a magistrate. At 315. The length and complexity of the record, the familiarity with the record of the judge who tried the suit and, conversely, the magistrate's unfamiliarity with the record, all factors which are present here, *ante* at 17 n.6, are the very reasons why this Court has insisted on strict compliance with Rule 53(b)'s constraints and the mandates of the Constitution. *La Buy* at 311; *Mathews*, at 556.

Petitioner asked the district judge to rule on a judicial immunity challenge to her prevailing status asserted *after* her fee claim was *first* referred to the magistrate *before* remanding it to the magistrate. The district judge ignored this request. When the magistrate refused her request for orders defining the disputed issues, she made timely objection by moving the District Judge to withdraw the reference or define the issues. *Compare Cruz*, 515 F.2d at 330-331. The District Judge denied the motion. Nor can she have waived her right to object to trial of issues which ostensibly were not in dispute when both the magistrate and the District Judge refused her repeated requests for an order defining the issues. *Hayes v. Foodmaker, Inc.*, 634 F2d 802, 803 (1980). The reference was on the District Judge's own motion and lacked the parties' consent, as required by 28 U.S.C. § 636(b)(2). *Banks*

v. United States, 614 F.2d 95, 97 (CA6 1980). Hence the only statutory authority under which the magistrate could try the prevailing status issue was 28 U.S.C. § 636(b)(3). But *de novo* review is mandatory under § 636(b)(3). *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355 (1980); *Hill v. Jenkins*, 603 F.2d 1256, 1258 (CA7 1979). Here there was no such review and, therefore, no "finding" that was incorporated in the judgment reviewed by the Court of Appeals. The magistrate merely substituted his judgment for that of the Court, contrary to *La Buy*'s express prohibition. 77 S.Ct. at 313.

CONDUCT OF THE FEE HEARING

The wide divergence of the proceedings before the magistrate from the accepted and usual course of judicial proceedings is apparent from the following summary of the facts stated *ante* at 14-17.

1. The manner of setting hearing dates

violated FRCP 53(d), which specifically requires the magistrate "to proceed with all reasonable diligence".

2. The citation of FRCP 53 in the order of reference, that Rule's express limitations (only "matters of account"), specifically denying orders defining the issues while issuing a pre-trial order suggesting that petitioner's prevailing status was not disputed, and respondents' pre-hearing pleadings suggesting that it was not disputed, led her counsel to believe that they were in Court to address "hours reasonably expended on the litigation", "reasonable hourly rate", "results obtained" and other Rule 53 and *Hensley* stated concerns.

3. By repeatedly granting continuances, peremptorily converting a conference to a hearing, quashing petitioner's subpoenas "*ex proprio motu*" and threatening further long delay if she did not conclude her

case, the magistrate denied her opportunity of examining her principal witness.

The conduct of the proceeding in this manner obliged petitioner, without help of discovery or examination of witnesses and *after the hearing*, to construct a case for prevailing status from materials she had used for her *other* claims. The magistrate concluded that she had not "prevailed", the District Judge affirmed his factual finding under Rule 53(e) and the Court of Appeals affirmed under Rule 52(a), thus implicating the very prohibition expressed by this Court in *La Buy*. The magistrate's judgment was substituted for that of the Court.

THE CAUSATION FINDING

Anderson v. City of Bessemer City, N.C. reaffirms settled judicial policy against retrying fact issues resolved by the trial court. However, it does recognize a limit to the discretion conferred on the trial

court, whose findings must be supported by *some plausible evidence*. 105 S.Ct. at 1512. Here there was *none*.

The lower courts found support for the magistrate's finding of no *nexus* between this suit and the rule changes in *Anderson*'s study suggestion made "even prior to the events of this case" and "the apparently credible testimony of Thomas O. Collins and John Combe concerning LSBA's motives for the [rule] change". A122-123, 21-22.

The state court's study suggestion

The state court could have changed its rules without resorting to the LSBA, *Faylona*, 381 So.2d at 1205, but it *did not change its rules*. It relied instead on the LSBA to propose changes, *ib.*; *Anderson*, 377 So.2d at 1187. The LSBA in turn assigned the task of acting on the *Anderson* suggestion to the CBA's Chairman, A147-148, who believed that *Tucker II* had

"overruled" *Anderson* and that the rules were constitutionally sound. A128-129. Thus the rules were not changed. Six months after *Anderson* the district judge asked the CBA's Chairman about progress in changing the rules and he replied that there was none. Entrusting such a task to the man who had spent many years defending the rules was like asking Chief Justice Burger whether, in his judgment, violent, popular revolt is needed to reform the Internal Revenue Code.

Anderson did not *order* a rule change. It did not even suggest that the rules *should* be changed. It "suggested" that a committee conduct a "study" to determine "whether" the rules should be changed. At 1187. As the state court was unwilling to act on its own, *Anderson*'s study suggestion must be evaluated in light of the structure of authority then in place to act upon that suggestion, and, so viewed,

it was clear that nothing would be done about it. And nothing was done about it. Respondents, represented by the CBA's Chairman, continued resisting this suit, and the CBA, represented by its Chairman, continued resisting accreditation rule petitions in state court until this suit compelled change 15 months after *Anderson*.

Collins' and Combe's testimony

The magistrate copied his summary of Collins' and Combe's testimony *verbatim* from respondents' post-hearing brief. He found, first, that they testified that the rule changes were not "mandated" by this litigation, A108, a fact which is not disputed and requires no testimony or proof. The district judge expressly did not reach the issue of the rules' constitutionality. A43.

The magistrate found, second, that the Task Force was appointed to consider changing various rules, not just the rules at-

tacked in this litigation, which may be, but the issue is not what the Task Force was asked to consider *after* the decision was taken to appoint it. The issue is what *caused* its *appointment*.'".

Finally, the magistrate found that this litigation was "not the moving force in the foreign trained students rule revision ...*[T]hey* would have suggested the rule change even if there had been no Tucker litigation". A108-109 (emphasis added.)

The crucially important word in this finding is "they". Collins and Combe did not appoint the Task Force, A144, and did not testify as to the *LSBA*'s motives in

15. *None* of the other changes were the subject of the antecedent litigation which, Collins stated in a prior admission, prompted the appointment, and they were changes of secondary importance. Articles published in the LSBA's bar journal and annual report clearly treated them as less important than those affecting foreign trained lawyers. *See* La.Bar.J., vol.30, p.68 (1982). They consisted chiefly of increasing the CBA from 10 to 11 members and adding an exam subject.

appointing the Task Force. Collins admitted that he could *not* "speak for the Bar Association"'s motives in appointing the Task Force and was only expressing a "guestimation". A144. Combe allowed that he only became familiar with the issues involved *after* its appointment, and "[a]n agenda prepared by Mr. Collins" first acquainted him with "the problem of the accreditation rule". A142-143. Their evidence is thus explicitly incompetent, hearsay, opinion testimony. Mr. Glusman, *who did appoint the Task Force*, was not called as a witness, and Collins' "agenda" was not proffered. But the district judge felt bound by the "clearly erroneous" rule to affirm the finding. .

The evidence for causation

On the other hand, the evidence of a *nexus* between this suit and the rule changes is substantial, as shown by the following summary:

1. The LSBA "discussed" the need for changes "over the years", A145, but did nothing about it until petitioner obtained injunctions assuring access to the bar exam, summary judgment shedding doubt on the accreditation rule's constitutionality and branding the disbarment/equivalence procedure, an order rejecting the LSBA's request for that procedure, moved for fees[16] and established her equivalence. A145-146.

2. Instead of accepting petitioner's offer to stay proceedings to allow a rule change study, respondents continued to resist this litigation until summary judgment was awarded against them 14 months after *Anderson*, while the CBA contested *four more* waiver petitions attacking the rule. In all, the CBA contested *and lost*

16. Cases noting the catalytic role of fee petitions include *Ramos v. Lamm*, 713 F.2d 546, 552 (CA10 1983); *Copeland v. Marshall*, 641 F.2d 880, 895 (CADC 1980) (*en banc*); *Palmigiano v. Garrahy*, 616 F.2d 598, 600 (CA1 1980); *Dennis v. Chang*, 611 F.2d 1302, 1306 (CA9 1980).

eleven consecutive accreditation rule waiver petitions.

3. The LSBA's Executive Counsel (Mr. Collins) explained in an article written shortly after the Task Force's appointment and two years before his testimony at petitioner's fee hearing that the Task Force was appointed to alleviate the burdens caused by litigation attacking bar admission rules and procedures. A134. This suit was the only such litigation then pending, and the Task Force was appointed 7 days after petitioner's equivalence hearing.

4. Both the Task Force's actions and the content of its proposals for change mirrored precisely the claims and results of this suit. The suit established that the issue presented by its attack on the accreditation rule, *as applied to foreign trained candidates* was *res nova*, A42, and the LSBA conceded (after contending otherwise) that a distinction had to be made

between domestically and foreign trained candidates. A135-136. The suit was unique in attacking the State's failure to prescribe educatonal requirements for foreign trained candidates, and the Task Force provided a three professor equivalence determination panel *explicitly modelled on petitioner's equivalence proceeding*. A139. The suit was unique in attacking the use of a disbarment procedure for determining equivalence. The Task Force noted, "In one of the recent cases [*i.e.*, this case], there was an objection to the use of 'disciplinary proceedings' for a bar applicant's petition and appeal", A139, and provided a procedure, A141, exactly respecting the time parameters contained in the District Court's declaration, A50, and exactly mirroring the state court's order in *Tucker II*. A53. The suit was unique in attacking the failure to provide a definitive procedure governing waiver petitions.

The Task Force stated, "This change will give the Court and the Committee definitive rules governing matters appealed to the Court.." *Tucker II* was alone in challenging the commissioner's claim to compensation. The Task Force provided: "The commissioner shall serve without compensation." *Tucker II* first questioned the LSBA's standing to oppose petitions to the state court for relief from the CBA's actions. The Task Force provided for LSBA standing to oppose such petitions.

5. Four of the Task Force's nine members were Justice Marcus, one of the respondents to this suit, Justice Dennis, who participated in *Tucker I* and *Tucker II*, the CBA's chairman, who is respondents' counsel, and the LSBA's executive counsel, who has been copied in correspondence in this litigation, all men who were familiar with the details of this suit.

6. Collins admitted on cross-examination that "one factor" in reviewing copies of documents in this litigation was their "possible pertinence to rule change" and that the Task Force came into being, "more than anything", in response to "current philosophy and evolution of the law" governing the disbarment/equivalence procedure - which "evolution" was unique to this litigation. In other words, this witness testified that this litigation was "a material factor" "contribut[ing] to the improvements achieved".

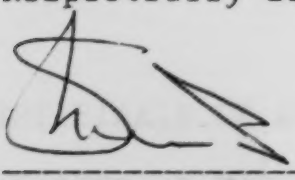
This finding is thus supported by *no* plausible evidence, refuted by substantial evidence, and should be reversed in accordance with *Anderson v. City of Bessemer City, N.C. See Martin v. Heckler*, 773 F.2d at 1149 (*en banc* court of appeals reversing panel's affirmance of district court's causation finding: "[w]e have searched the record in vain to find anything that would

show that plaintiff's action was not necessary to bring about a change in policy"); *Hennigan*, 749 F.2d at 1149 (defendant who moots claim has the burden of proving that he made change gratuitously for reasons unrelated to the potential merit of the suit).

CONCLUSION

For the foregoing reasons, petitioner Carole Shelby Carnes Tucker, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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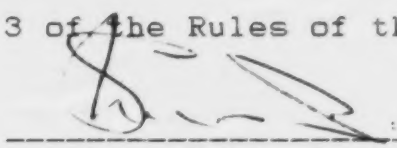
CERTIFICATE OF SERVICE

I, Shelby Tucker, a member of the Bar of this Court, certify that, on the _____ day of June, 1986, I effected service of three copies of the foregoing Petition, including its separately bound Appendix, on counsel of record for all opposing parties in strict accordance with the requirements of Rule 28.3 of the Rules of this Court.



Shelby Tucker

NO. 85 - 1994

Supreme Court, U.S.
FILED
JUN 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1985

CAROLE SHELBY CARNES TUCKER,
Petitioner,

versus

The Honorable WALTER F. MARCUS, JR., FRED A. BLANCHE, JR., JACK C. WATSON, and THE SUPREME COURT OF LOUISIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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EDITOR'S NOTE

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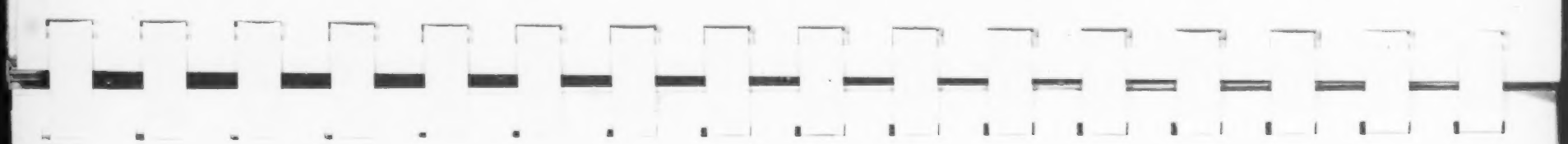

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-3355

Carole Shelby Carnes Tucker,
Plaintiff-Appellant,
Cross-Appellee,

v.

The Honorable Frank W. Summers, et. al.,
Defendants-Appellees,

and

Justices Walter F. Marcus, Jr., Fred A. Blanche, Jr., Jack C. Watson, and The Louisiana Supreme Court,
Defendants-Appellees,
Cross-Appellants.

Filed March 10, 1986

Before: Charles Clark, Chief Judge, Henry A. Politz, and Edith H. Jones, Circuit Judges.

Opinion by Judge Henry A. Politz

Appeals from the United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., Senior District Judge, Presiding

SUMMARY

Attorneys

Appeal from a denial of attorneys' fees under the Civil Rights Attorney's Fees Act

of 1976, 42 U.S.C. § 1988. Affirmed.

Appellant applied to the Louisiana State Bar Association to take the February 1980 bar examination, but was denied permission because she was not a graduate of a law school approved by the American Bar Association. She petitioned the Supreme Court of Louisiana for permission to sit for the exam, and her petition was denied. She petitioned the federal district court for a temporary restraining order, which was denied. She then appealed to the Fifth Circuit, and this court entered an order allowing her to take the test, but not speaking to her subsequent admission. She failed the bar, took it again that summer, and partially repeated it again in February 1981, successfully passing the exam. The Louisiana Supreme Court ordered an equivalency hearing and she was admitted to the bar. She and her husband-attorney began efforts to secure an award of attor-

neys' fees.

[1] Under the Act, a prevailing party in a civil rights suit may be granted, in the discretion of the court, a reasonable attorney's fee as part of the costs. The district court determined she was not a prevailing party. [2] Appellant's contention that she is the prevailing party because she secured permission from the court to take the bar is not persuasive because the panel lacked subject matter jurisdiction when it entered the order directing that she be permitted to sit for the exam, [3] because her proceedings before the Louisiana Supreme Court were judicial in nature, and under *Dist. of Col. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), review could only lie in the Supreme Court. The entry of an order by a court which should have declined jurisdiction cannot serve as the basis for prevailing-party status. [4] Nor did the

subsequent rules change make her a prevailing party. Instead, the change mooted her claim before it was addressed by the court. The findings by the special master and district court that this case did not play a significant or relevant part in the later rules changes are not clearly erroneous.

OPINION

HENRY A. POLITZ, Circuit Judge:

The sole issue presented by this appeal of litigation initiated in February of 1980 is the claim of the plaintiff-appellant to attorneys' fees under the Civil Rights Attorney's Fees Act of 1976, U.S.C. § 1988. Based on a report of a special master, then magistrate, now district judge Marcel Livaudais, Jr., the district court denied the petition for fees. For the reasons assigned, we affirm that judgment.

Before this court for its fifth appea-

rance, with a record including 11 volumes of pleadings and several boxes of previously sealed documents, this case gives, at first blush, the semblance of being complex and difficult. It is neither. The dispositive facts and controlling rubrics are readily apparent.

In January of 1980, Carole Shelby Carnes Tucker applied to the Louisiana State Bar Association, through its Committee on Bar Admissions, to take the February 1980 Louisiana Bar Examination. At that time, Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association imposed a requirement that a bar exam applicant be a "graduate of a law school that is approved by the American Bar Association." Because Tucker's legal education in England had not been at such a law school, the Committee on Bar Admissions rejected Tucker's application. Tucker petitioned the Supreme Court of

Louisiana for permission to sit for the bar examination. Her petition was denied, as was a petition for rehearing.

On February 15, 1980, Tucker petitioned the district court seeking a temporary restraining order and preliminary and permanent injunctions enjoining the Supreme Court of Louisiana, its justices and representatives "from denying plaintiff, Carole Shelby Carnes Tucker, her right to take the Louisiana State Bar Examination, at present due to be administered in New Orleans on February 25, 27 and 29, 1980." The district court denied the petition on February 21, 1980. Tucker appealed to this court and sought injunctive relief pending appeal. Because of the obvious time constraints, a motions panel of this court, in docket number 80-3143, accorded the application emergency status and, on February 23, 1980, entered an order restraining defendants "from denying Carole Shelby

Carnes Tucker permission to take the Louisiana State Bar Examination to be administered on February 25, 27 and 29, 1980." The order addressed only the taking of the examination; it did not speak to subsequent admission.

Tucker sat for but failed the February 1980 bar examination. Upon order of the district court, she was permitted to repeat the examination during the July 1980 testing, followed by a partial retake in February of 1981. After the third round of testing, Tucker successfully passed the required subjects, and the Louisiana Supreme Court ordered an equivalency hearing. Thereafter, Tucker was admitted to the Louisiana State Bar Association. Upon receipt of her notice of admission, Tucker and her husband-attorney began their efforts to secure an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

The voluminous record in this case is

the result of a veritable deluge of filings, a hurricane of paperwork far beyond that reasonably needed for a fair, expeditious, and just resolution of the dispute. This litigation has assumed a life of its own, bearing little relationship to the original action. That excesses have abounded is apparent from this record, which includes abusive use of Fed.R.Civ.P. 26(c) protective orders which, upon specific direction of this court, were reviewed and vacated by the district court. For present purposes, we make no effort either to quantify or assess blame for these excesses, but pointedly note that this litigation is anything but a model to be emulated. It is the exact opposite.

ANALYSIS

[1] Under 42 U.S.C. § 1988, a party who prevails in a civil rights suit may be granted, in the discretion of the court, "a reasonable attorney's fee as part of

the costs." We must determine whether Tucker qualifies as a prevailing party and, if so, whether the trial court abused its discretion in refusing to grant her attorneys' fees. The trial court, adopting in part the report of the special master, found that Tucker was not a prevailing party, citing the recent decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). To the extent the prevailing party designation is factual, the court's finding is supported by the record. To the extent it is a legal conclusion, we agree with the district court.

Tucker asserts prevailing-party status because she secured orders from this court, and from the trial court, which permitted her to sit for the Louisiana Bar Examination. She further maintains that she is a prevailing party because her litigation precipitated or effectively

caused a change in the rules of the Louisiana Supreme Court and Louisiana State Bar Association relating to graduates of foreign law schools. Those graduates may now sit for the bar examination upon a showing that their legal education is equivalent to that of graduates of law schools approved by the American Bar Association. Neither of Tucker's assertions is persuasive.

BAR EXAMINATION ORDERS

[2] Tucker was permitted to sit for the Louisiana Bar Examination as a direct consequence of the February 23, 1980 order of this court in docket number 80-3143. Informed and instructed by the intervening decision of the Supreme Court in *Dist. of Col. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), we are now persuaded that the 80-3143 panel lacked subject matter jurisdiction when it entered the order direct-

ing that Tucker be permitted to sit for the February 1980 bar examination. Accordingly, that order was improvidently entered. The entry of an order by a court which should have declined jurisdiction cannot serve as the basis for prevailing-party status. *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1981). We agree with our colleagues of the Seventh Circuit "that a plaintiff is not a prevailing party within the meaning of section 1988 if he had no legal right to the preliminary relief he obtained." *People Organ. For Welfare & Emp. Rights v. Thompson*, 727 F2d 167, 169 (7th Cir. 1984). *See also Redd v. Lambert*, 674 F.2d 1093 (5th Cir. 1982).

Tucker's original petition complained of the treatment she had been accorded by the Supreme Court of Louisiana and the Committee on Bar Admissions in rejecting her application to sit for the February 1980 bar examination. Tucker questioned the ap-

plication of the governing rule and the Articles of Incorporation of the Louisiana State Bar Association, noting that other foreign-trained applicants previously had been allowed to take the bar examination. She unsuccessfully presented these challenges, including constitutional challenges, to the Louisiana Supreme Court. The complaint Tucker filed on February 15, 1980 sought to have the federal district court review the Louisiana Supreme Court's denial of her application to sit for the February 1980 bar examination. As *Feldman* teaches, this may not be done.

As was the case in *Feldman*, Tucker's proceedings before the Louisiana Supreme Court were judicial in nature. As was done in *Feldman*, Tucker asserted that she possessed all qualifications needed for admission to the bar, setting forth in detail her legal training and experience and contending that her education was equal to

that received by the applicants who attended law schoools approved by the American Bar Association. Both Feldman and Tucker pointed to others who had received waivers of the accredited law school requirement. As the Supreme Court noted:

> When [the equivalent of the highest state court] issued a *per curiam* order denying Feldman's petition, it determined as a legal matter that Feldman was not entitled to be admitted to the bar without examination or to sit for the bar examination. The court had adjudicated Feldman's "claim of a present right to admission to the bar" and rejected it. This is the essence of a judicial proceeding.

460 U.S. at 480-81, *quoting In re Summers*, 325 U.S. 561, 568 (1945). In so stating, the Supreme Court reminded that "[t]he form of the proceeding is not significant. It is the nature and effect which is controlling." 460 U.S. at 482.

Having determined that the proceedings on the petitions of Feldman and of co-petitioner Hickey were judicial, the Supreme

Court sounded this clarion note:

> [A] United States District Court had no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court. Therefore, to the extent that Hickey and Feldman sought review in the District Court of the...denial of their petitions for waiver, the District Court lacked subject-matter jurisdiction over their complaints. Hickey and Feldman should have sought review...in this Court.

Id. at 482 (footnote omitted).

[3] Therefore, to the extent that Tucker sought review of the decision of the Louisiana Supreme Court rejecting her application to take the Louisiana Bar Examination, that review could only be had in the United States Supreme Court. Neither the federal district court nor this court had or has subject-matter jurisdiction over that dispute. *Feldman*. That includes "jurisdiction to review constitutional claims that 'are inextricably intertwined with the state court's denial in a judicial

proceeding of a particular plaintiff's application for admission to the state bar.'" *Thomas v. Kadish*, 748 F.2d 276, 177 (5th Cir. 1984), *cert. denied*, __ U.S. __, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985), *quoting Feldman*, 460 U.S. at 483 n.16. *See Tofano v. Supreme Court of Nevada*, 718 F.2d 313 (9th Cir. 1983); *Lowrie v. Goldenhersh*, 716 F.2d 401 (7th Cir. 1983).

Since we did not have the requisite jurisdiction, our emergency order of February 23, 1980 was inappropriately issued. Neither it nor the district court's orders based on it serve Tucker's cause. She may not advance the fact that she secured these court orders permitting her to sit for the Louisiana Bar Examination as proof of prevailing-party status required for an award of attorneys' fees under 42 U.S.C. § 1988.

THE RULES CHANGE

[4] *Feldman* further teaches that the fe-

deral district court does have jurisdiction to entertain a general challenge to the constitutionality of a state bar's admission rules, as distinguished from an action "seeking review in a federal district court of a state court's final judgment in a bar admission matter..." *Id.* 483-84. The district court concluded that it had jurisdiction over what it viewed as a general constitutional attack on the accreditation rules. Assuming without deciding the correctness of that ruling, we agree with the district court that Tucker did not become a prevailing party because of the subsequent change in the rules by the Louisiana State Bar Association and Louisiana Supreme Court. That change mooted Tucker's claim before it was addressed by the court. The findings by the special master and district court that the instant case did not play a significant or relevant part in the later rules change are

not clearly erroneous. Indeed, those findings are amply supported by the record. In reviewing the record, we are guided by the unequivocal, "clearly erroneous" mandate of Fed.R.Civ.P. 52(a) and the many cases applying that rule, citation of which would be entirely superfluous.

Tucker contends that she was a prevailing party because her suit was the catalyst or precipitant of the change in the rules. The record does not support that position. Prior to Tucker's suit, the Louisiana Supreme Court had suggested a re-examination of the accreditation rule. The comments of a majority of the justices in *Application of Anderson*, 377 So.2d 1185, 1187 (La. 1980) are specific: "[W]e suggest that the proper rule-making committee of the Louisiana State Bar Association study whether the [accreditation] rule should be changed and thereafter present the results thereof to this court for our

consideration." Because of this direction, and other problems experienced over the years with the admissions rules, a Louisiana State Bar Association Task Force to Revise Bar Admission Rules was formed. But the task force neither came into being nor tailored its performance because of Tucker's suit. The members of the task force were aware of the instant litigation, as they were aware of all prior litigation and near-litigation involving the administration of the admisssions rules. But this litigation was not a moving force.

We join the special master and district court in their assessment of the credibility of the then-president of the Louisiana State Bar Association, John C. Combe, Jr., and of that association's longtime Executive Counsel, Thomas O. Collins, Jr. Their testimony reflects that Tucker's suit had an insignificant effect on the subsequent rules modifications. Tucker's

efforts to prove otherwise by reciting a chronology of events and by very skillful briefing and argument is not persuasive. We conclude and hold that Tucker's suit was not "'a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior" (if indeed the behavior of the present defendants was unconstitutional, an issue we do not reach), *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1152 (5th Cir. 1985) (*quoting Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984), *cert denied*, __ U.S. __, 105 S.Ct. 2139, 85 L.Ed.2d 497 (1985)); *Frazier v. Bd. of Trustees of Northwest Miss. Reg. Med. Ctr.*, 765 F.2d 1278 (5th Cir. 1985).

The judgment of the district court rejecting the petition of Tucker for an award of attorneys' fees is AFFIRMED.

Application of Carole Shelby Carnes TUCKER for Permission to take the Louisiana Bar Examination and, contingent on passing the examination, to be certified for admission to the Louisiana State Bar Association.

No. 66745

Supreme Court of Louisiana.

Feb. 8, 1980.

In re Carole Shelby Carnes Tucker, applying for permission to take the Louisiana Bar Examination, etc.

Application denied.

DIXON, J., is of the opinion this applicant should be permitted to take the bar examination. Her qualifications are apparently better than any applicant who has petitioned this court to take the bar exam in the last 9 years. We have never denied any applicant with similar qualifications permission to take the examination. We have held that the rule must be changed, and when it is changed, this applicant will be qualified. See *Cynthia Caroline Dawn Marie Anderson for Admission to the*

Louisiana Bar, 377 So.2d 1185 (1980).

CALOGERO, J., would grant permission to take the bar exam.

DENNIS, J., would grant applicant permission to take the bar examination and continue this court's former practice of allowing persons found qualified by this court to be admitted to practice on a case by case basis until our rules are changed to provide for a fair and systematic method for evaluating graduates of law schools in other nations.

Application of Carole Shelby Carnes TUCKER for Permission to take the Louisiana Bar Examination and, contingent on passing the examination, to be certified for admission to the Louisiana State Bar Association.

No. 66745

Supreme Court of Louisiana.

Feb. 15, 1980.

In re Carole Shelby Carnes Tucker, applying for rehearing of denied writ of February 8, 1980.

Reconsideration denied.

DIXON, CALOGERO and DENNIS, JJ., would grant reconsideration.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 80-3143

CAROLE SHELBY CARNES TUCKER,

Plaintiff-Appellant,

versus

THE HONORABLES FRANK W. SUMMERS, JOHN A. DIXON, JR., PASCAL F. CALOGERO, JR., WALTER F. MARCUS, JR., JAMES L. DENNIS, FRED A. BLANCHE, JR., and JACK C. WATSON, Individually and In Their Capacities as Justices of THE SUPREME COURT OF LOUISIANA, and THE SUPREME COURT OF LOUISIANA,

Defendants-Appellees.

- - - - -

Appeal from the
United States District Court for
the Eastern District of Louisiana

- - - - -

Before GEE, RUBIN and POLITZ, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's application for a temporary restraining order and motion for preliminary injunction pending appeal is GRANTED, but only to the following extent; the defendants are enjoined from denying Carole Shelby Carnes Tucker permission to take the Louisiana State Bar Examination to be administered on February 25, 27 and 29, 1980, and are ordered to permit her to do so. Her examination paper shall be graded in the same manner as the papers of other applicants. This order does not require the defendants to admit her to practice in the state of Louisiana. Compare the order entered on June 29, 1978 in the matter of Cynthia Caroline Dawn Marie Anderson, No. 62510 on the docket of the Supreme Court of Louisiana.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION D
JAMES E. SMITH, JR.	NO. 80-656
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION D
	CONSOLIDATED

O R D E R

Pursuant to the order of the Fifth Circuit Court of Appeals dated March 28, 1980, in No. 80-3143 on the docket of said court,

IT IS ORDERED that the bar examination papers of the plaintiffs be graded and processed and the results thereof be communicated to plaintiffs in accordance with the examining committee's usual procedure for grading, processing and disclosing the

results of the bar examination to applicants for admission to the bar generally.

New Orleans, Louisiana, this 11th day of April, 1980.

[Signed Edw. J. Boyle, Jr.]
UNITED STATES DISTRICT JUDGE

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Shelby Tucker

John H. Musser, IV

Edward Wegmann

Carl J. Barbier

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION D
JAMES E. SMITH, JR.	NO. 80-656
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION D

TEMPORARY RESTRAINING ORDER

IT IS ORDERED that the defendants are hereby enjoined from denying Carole Shelby Carnes Tucker and James E. Smith, Jr. permission to take the Louisiana State Bar Examination to be administered on July 14, 16 and 18, 1980, and are ordered to permit them to do so. The bar examination papers of plaintiffs are to be graded and processed and the results thereof communicated to plaintiffs in accordance with the examining committee's usual procedure for gra-

ding, processing and disclosing the results of the bar examination to applicants for admission to the bar generally.

This order shall remain in effect, without further order or formality, until the results of the said bar examination are communicated to plaintiffs. All parties have consented to this procedure.

New Orleans, Louisiana, this 30th day of May, 1980.

[Signed Edw. J. Boyle, Jr.]
UNITED STATES DISTRICT JUDGE

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Shelby Tucker

John H. Musser, IV

Edward Wegmann

Carl J. Barbier

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION D

O R D E R

Considering that counsel for defendants have notified the court that they have no opposition to the entry of this order,

IT IS ORDERED that the defendants be and they are hereby enjoined from denying Carole Shelby Carnes Tucker permission to take the Louisiana State Bar Examination commencing on February 9, 1981, and the defendants are ordered to permit her to do so.

IT IS FURTHER ORDERED that the plaintiff's bar examination papers are to be graded and processed and the results thereof communicated to her in accordance

with the examining committee's usual procedure for grading, processing and disclosing the results of the bar examination to applicants for admission to the bar generally.

This Order shall remain in effect without further order or formality until this court has ruled on the merits of the proceedings herein and the results of the said bar examination papers have been communicated to the plaintiff.

New Orleans, Louisiana, this 8th day of January, 1981.

[Signed Edw. J. Boyle, Jr.]
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER NO. 80-594

VERSUS CIVIL ACTION

THE HON. FRANK W. SUMMERS, ET AL SECTION D

MEMORANDUM OPINION AND ORDER

Shelby Tucker

Attorney for Plaintiff

Carl Barbier

Attorney for Defendants

BOYLE, District Judge:

This matter came before the court upon the motion of plaintiff for summary judgment and was taken under submission without oral argument.

Plaintiff, a citizen of the United States and a licensed barrister in England and Wales, filed this action pursuant to 42 U.S.C. § 1983, and Article IV, § 2 and the Fifth and Fourteenth Amendments to the

United States Constitution, seeking to be permitted to sit for the Louisiana bar examination, and for "such further legal, equitable and declaratory relief as the circumstances may warrant...." (Record Document No. 1, Prayer.) Defendants are the Justices of the Supreme Court of Louisiana, in their individual and official capacities[1/] and the Supreme Court of Louisiana.

Plaintiff applied to the Supreme Court of Louisiana, Committee on Bar Admissions, for permission to take the Louisiana bar examination scheduled to be administered on February 25, 1980. Her application was received on January 2, 1980. (*See* Record

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1/ Plaintiff originally sued The Honorables Frank W. Summers, John A. Dixon, Jr., Pascal Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., and Jack C. Watson (Record Document No. 1). Plaintiff has dismissed Hon. Frank W. Summers, who, subsequent to the filing of the complaint, retired as Chief Justice, as a defendant. (Record Document No. 42.)

Document No. 1, Exhibit C-1/P-1.) By letter dated January 28, 1980, from the Chairman of the Committee on Bar Admissions, plaintiff was informed that her application had been rejected because of her inability to satisfy the requirements of Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association, that all applicants must produce satisfactory evidence that they are graduates of law schools approved by the American Bar Association. On February 1, 1980, plaintiff filed a petition in the Supreme Court of Louisiana seeking waiver of the requirement of graduation from an ABA-approved law school. The petition was denied without a hearing. On February 12, 1980, plaintiff filed a petition for rehearing in the Supreme Court of Louisiana. That petition was also denied.

Plaintiff then filed the present suit on February 15, 1980. This court on Feb-

ruary 21, 1980, denied the plaintiff's motion for temporary restraining order to restrain the defendants from denying her permission to take the Louisiana bar examination. Plaintiff appealed and the Fifth Circuit granted the temporary restraining order sought, but the order specifically stated that in the event plaintiff passed the examination, defendants were not required to admit her to the bar. The Fifth Circuit then stayed further proceedings in that court pending trial on the merits or on such other matters as might properly come before the district court. (Record Document No. 11.)

Plaintiff then took and failed the February, 1980, bar examination. Pursuant to an order of this court, defendants permitted plaintiff to sit for the July, 1980, examination, which she "conditioned." After such a result, an applicant is required to re-take only certain sections

of the bar examination and is excused from re-examination in those subjects in which a passing grade was received. Plaintiff took certain sections of the February, 1981 bar examination and the results of that examination have not yet been made public.

Plaintiff, in her motion for summary judgment, asserts that there are no material facts in controversy and she is entitled to judgment as a matter of law because she alleges:

(1) that Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association, requiring all applicants to prove they have graduated from an ABA-approved law school, is facially unconstitutional as applied to foreign-trained applicants;

(2) that defendants denied plaintiff equal protection when they denied her the right to prove her training was the substantial equivalent of graduation from an ABA-approved school; and

(3) the procedure employed in determining the substantial equivalence of foreign and domestic credentials is

constitutionally impermissible.

Plaintiff specifically does not challenge the constitutionality of the requirement of graduation from an ABA-approved law school as applied to applicants who were graduated from law schools in the United States and she would be unable to sustain any such challenge. *See, e.g., Donnelly v. Boston College*, 558 F2d 634 (1st Cir. 1977), *cert. denied*, 434 U.S. 987, 98 S.Ct. 618, 54 L.Ed.2d 483 (1977); *Lombardi v. Tauro*, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919, 93 S.Ct. 2734, 37 L.Ed.2d 135 (1972); *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966), *cert. denied*, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966); *Potter v. New Jersey Supreme Court*, 403 F.Supp. 1036 (D.N.J. 1975), *aff'd*, 546 F.2d 418 (3rd Cir. 1976). Plaintiff limits her constitutional challenge to the application of the rule requiring graduation from ABA-ap-

proved schools to foreign trained candidates.

Plaintiff admits that the case law in support of her position is scanty and has cited only two unreported Nevada cases, *In re Burleigh*, No. 6874 (Nev. 1972) and *In re Standish*, No. 11838 (Nev.) discussed in *Application of Nort*, 605 P.2d 627 (Nev. 1980). From the discussion of these cases in *Nort*, we conclude that those cases are distinguishable. They merely demonstrate that a state supreme court or other body governing the admission of attorneys to the practice of law, may grant a waiver of the requirement of graduation from an ABA-approved law school to foreign-trained candidates in appropriate circumstances. This fact is not disputed by the defendants. The Nevada Supreme Court chose to waive the requirement for foreign trained applicants who could show that their schools were denied accreditation solely

on the basis that they were outside the geographical scope of the ABA accreditation process, and offered an education substantially similar, or superior, to that offered by ABA accredited schools. However, from the summary of those cases which is contained in *Nort*, it does not appear that the court considered whether it would be a violation of the constitutional rights of a foreign-trained applicant for admission not to grant such a waiver.

As the cases cited by plaintiff are distinguishable and defendants have cited no cases involving foreign-trained applicants for admission, we consider that the question of the alleged facial unconstitutionality of the rule requiring graduation from an ABA-approved law school, as it applies to foreign-trained applicants for admission to practice, is *res nova*.

However, we find that the Supreme

Court of Louisiana has so consistently granted waivers of the rule to foreign-trained applicants for admission to practice that it is unnecessary to consider the rule's facial unconstitutionality. Beginning in 1974 and continuing until the denial of plaintiff's application to take the Louisiana bar examination, the Supreme Court of Louisiana applied the rule, which is without exception on its face, as if it contained an exception on its face, as if it contained an exception for foreign-trained candidates. *See In re Lendais*, 310 So.2d 647 (La. 1974); Record Document No. 52, Exhibit J-2; *In re Faylona*, 354 So.2d 1347 (La. 1978); Record Document No. 52, Exhibit J-3; *Application of Anderson*, 377 So.2d 1185 (La. 1980); Record Document No. 52, Exhibit J-4. At the same time it granted such waivers, it urged that the implicit exception for foreign-trained candidates be made explicit. *Application of An-*

derson, supra, 377 So.2d at 1187. *See also* the dissent of Chief Justice Sanders in *In re Faylona*, supra, 354 So.2d 1348.

Less than one month before they denied plaintiff's application to take the bar examination, defendants had ordered the admission to practice of Cynthia Anderson, a foreign-trained applicant with educational credentials similar to those of plaintiff. Anderson had been permitted to sit for the bar examination and, upon passing the examination, to prove that her legal education was the substantial equivalent of that obtained at an ABA-approved law school. *Application of Anderson*, supra. The Supreme Court's order in *Anderson* came after plaintiff had filed her application to take the bar examination.

Further waivers were granted after denial of plaintiff's application to take the bar examination. On March 13, 1980, Bayani Virata Faylona, an applicant who

held two foreign law degrees and a graduate degree from a United States law school and who had passed the bar examination, was ordered admitted to practice. *Application of Faylona*, 381 So.2d 1203 (La. 1980). On July 3, 1980, the court ordered the Committee on Bar Admissions to permit Angela Mary Reilly, a foreign-trained applicant with educational credentials similar to those of plaintiff, to take the bar examination. *See In re Reilly*, 385 So.2d 802 (La. 1980). Record Document No. 52, Exhibit J-5. James E. Smith, Jr., plaintiff in a related case, was originally denied permission to take the Louisiana bar. He repetitioned the defendants for permission to take the bar examination and, on passing it, to prove the equivalence of his training to that obtained at an ABA-approved school. The permission was granted on October 2, 1980. *In re Smith*, No. 80-0-2214 (La. 1980). The most recent

waiver of the rule took place on February 5, 1981. *In re Ponce Aquino*, No. 81-O-0269 (La. 1981).

The Supreme Court of Louisiana has, with two exceptions since 1974, permitted foreign-trained applicants to take the bar examination and after further proceedings ordered them admitted to practice. The two exceptions were Carole Tucker, plaintiff here, and James E. Smith, Jr. Mr. Smith repetitioned the Supreme Court recently and has received relief.2/

In view of the practice of the Supreme Court of Louisiana of applying Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association as if it contained an exception for foreign-trained applicants allow-

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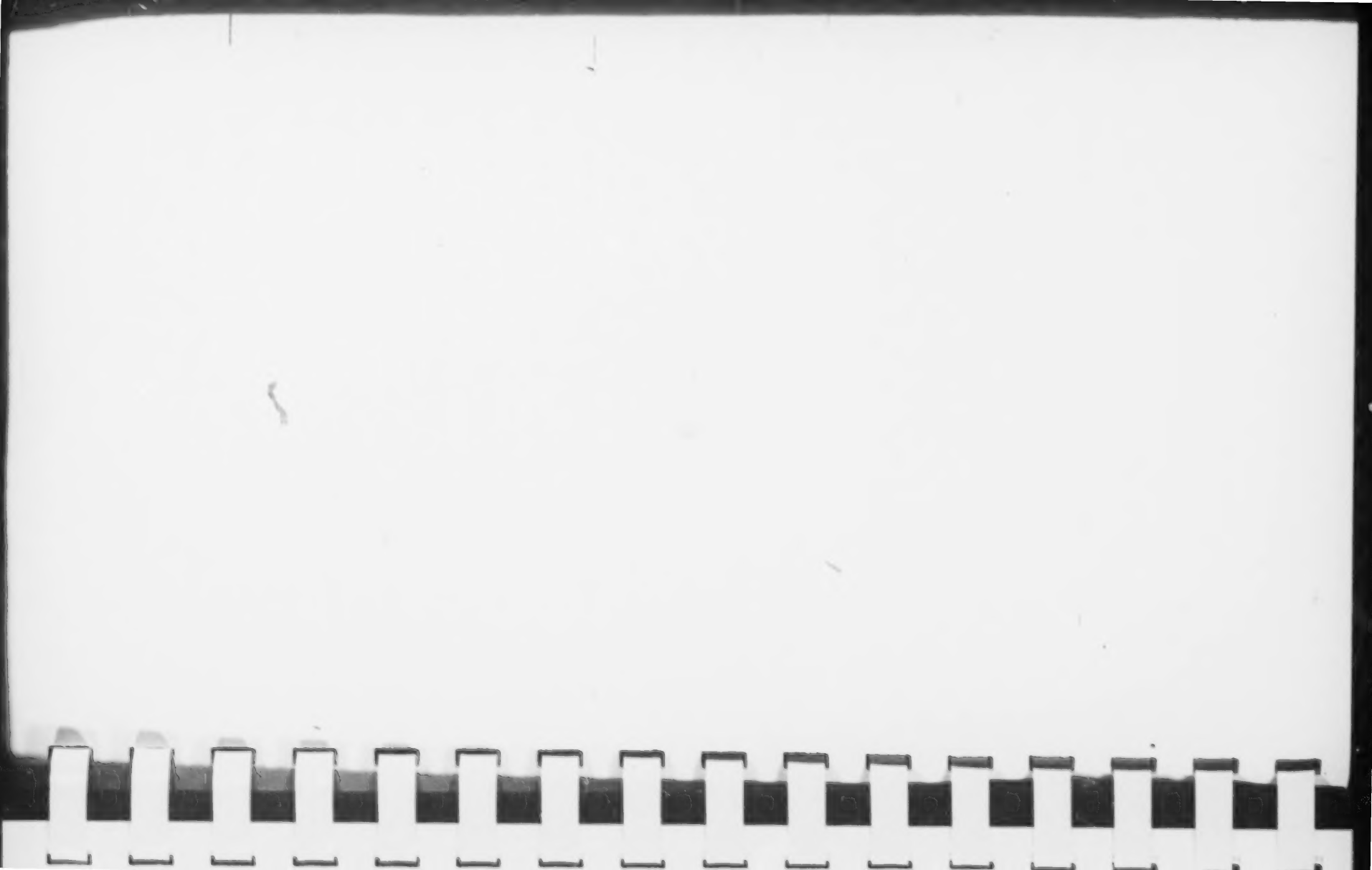
2/ Plaintiff Smith, in Civil Action No. 80-656, also contends that he is a graduate of an American Bar Association law school by virtue of his Master of Laws Degree from George Washington University Law Center.

ing them to prove the substantial equivalence of their educational credentials, we need not consider the constitutional challenge to the rule on its face. However, we proceed to consideration of the constitutionality of the rule as applied to plaintiff.

Plaintiff Tucker has demonstrated prima facie that her educational credentials are similar to those of other candidates who were permitted to prove "substantial equivalence." Indeed, Mr. Justice Dixon characterized her qualifications as "apparently better than any applicant who has petitioned...to take the bar examination in the last 9 years." *Application of Tucker*, 381 So.2d 1203 (La. 1980). We do not view the plaintiff's lack of a "law degree" as a bar to relief in view of the requirement that plaintiff's education be considered in the context of the differing nature of the English system of legal edu-

cation. *Application of Anderson*, supra. It is clear that plaintiff has been denied equal protection, in that similarly situated applicants who applied both before and after plaintiff applied were afforded the right to take the bar examination and then prove the equivalence of their education. Furthermore, it appears that after plaintiff applied to take the bar examination the previously applied standards were changed, constituting a violation of due process of the type found objectionable in *Dasher v. Supreme Court of Texas*, No. A-78-CA-152 (W.D. Tex. 1979). Accordingly, we conclude that, upon passing the bar examination, plaintiff must be permitted the opportunity to demonstate that her legal education in England satisfies the standards for approval of the American Bar Association.

Plaintiff also contends that the procedures presently employed in determining



substantial equivalence results in an unconstitutionally lengthy delay in the admission of qualified foreign-trained applicants. Plaintiff has submitted the affidavits of Bayani Virata Faylona and Cynthia Anderson, which establish that those persons were admitted to practice 17 and 16 months, respectively, after the admission of other persons who passed the bar examinations when they did. It should be noted that plaintiff Tucker, herself, has suffered no delay due to unnecessary protraction of the "substantial equivalence" proceeding since that proceeding begins only after a candidate for admission has passed the bar examination. Despite several attempts, plaintiff has not passed the bar examination.

While recognizing the broad discretion properly accorded to the defendants in establishing procedures to determine the qualifications of applicants for admission

to practice, fairness dictates that such decisions not be unduly delayed. However, this court acknowledges the delays inherent in obtaining evidence regarding education obtained in foreign countries. While we decline to find that the present procedures for determining "substantial equivalence" are unconstitutional, we suggest that any such proceeding which results in a final decision by the defendants on the "substantial equivalence" question more than six months after the announcement of a candidate's successful completion of the bar examination may result in such a finding, unless defendants are able to establish that the delay was not caused by them.

Because we believe that declaratory relief is sufficient, in this case, we decline to grant injunctive relief.

IT IS ORDERED that the Motion for Summary Judgment of plaintiff, Carole Shelby

Carnes Tucker, insofar as it seeks a declaration that in the event she passes the Louisiana bar examination she be permitted the opportunity to demonstrate that her legal education in England satisfies the standards for approval of the American Bar Association i. GRANTED. In all other respects, the motion is DENIED.

[signed Edward J. Boyle, Jr.]
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana

April 6, 1981

SUPREME COURT OF LOUISIANA

NO. 81-O-0972

APPLICATION

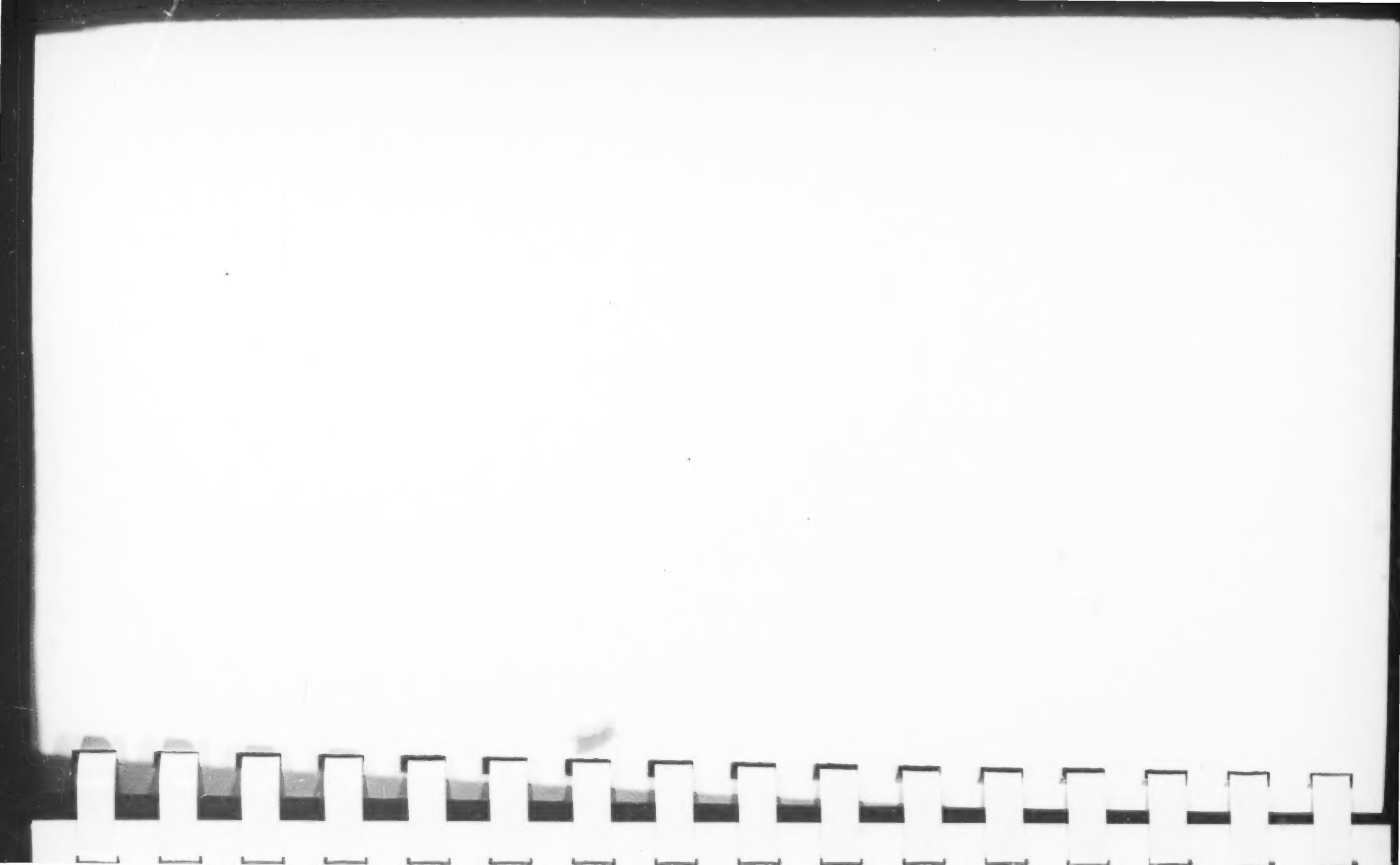
OF

CAROLE SHELBY CARNES TUCKER

O R D E R

IT IS HEREBY ORDERED that to give applicant an opportunity to prove the substantial equivalence of her legal education and experience to graduation from an American Bar Association approved school, Donald J. Tate is appointed commissioner to take evidence and report his findings to this court with the following instructions:

(1) All records of this Court as filed by the applicant, Carole Shelby Carnes Tucker, and respondent, Louisiana State Bar Association, through its Committee on



Bar Admissions, shall be considered by the commissioner to avoid the necessity of duplicate filings.

(2) A pre-hearing conference is to be held within 30 days from date of this order to determine what additional testimony, documentary evidence, or other filings will be offered and allowed.

(3) A hearing shall be held within 60 days from date of this order for the taking of evidence on any disputed issues.

(4) The commissioner shall report to this court within 90 days from the date of this order including his findings of fact and a recommendation as to whether petitioner's education and legal experience are substantially equivalent to the legal training received at an American Bar Association accredited law school.

NEW ORLEANS, LOUISIANA, this 5th day of May, 1981.

FOR THE COURT:

[Signed: John A. Dixon, Jr.]
JOHN A DIXON, JR.
Chief Justice

Dixon, C.J. concurs in the order, but is also of the opinion that the admitted facts concerning relator's practice as a barrister in England plus the documentation of relator's education which is in the application before us, clearly shows that the relator, having passed the La. bar examination, is qualified to practice law in La. and should be admitted without further delay.

SUPREME COURT OF LOUISIANA

NO. 81-O-0972

APPLICATION

OF

CAROLE SHELBY CARNES TUCKER

Report of Commissioner

By virtue of the order of May 5, 1981, the undersigned held a pre-hearing conference on May 19, 1981 and a hearing on June 11, 1981, and has closed the record. On that record,

1. Applicant's education and experience as an English barrister are equivalent to graduation from a law school approved by the American Bar Association.

2. Faculty members of two such law schools* (and the Commissioner from a

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* Professor Cynthia Ann Samuel of Tulane and Associate Dean John J. McCaulay of Loyola. (The Commissioner is full-time Professor at Southern University.)

third) so agree, and there is no contrary opinion evidence...

Mamou, Louisiana this 26th day of June, 1981

[Signed: Donald J. Tate
Commissioner

In re Application of Carole Shelby Carnes TUCKER.

No. 81-O-0972.

Supreme Court of Louisiana,

Aug. 17, 1981.

ORDER

On considering the appplication of Carole Shelby Carnes Tucker for admission to the practice of law in the State of Louisiana and on considering the report of the Commissioner filed in this matter,

IT IS ORDERED that Carole Shelby Carnes Tucker be admitted to the practice of law in the State of Louisiana. Ruling on the issue of costs is reserved pending further orders of the Court.

MARCUS, J., dissents from the order.

WATSON, J., concurs in the order.

BLANCHE, J., absent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER NO. 80-594

VERSUS CIVIL ACTION

THE HON. FRANK W. SUMMERS, et al SECTION "EJB"

MEMORANDUM OPINION AND ORDER

Shelby Tucker

Elliot G. Snellings

Brian J. Waid

Attorneys for Plaintiff

William J. Guste, Jr.
Kendall L. Vick
Patricia Nalley Bowers
Warren E. Mouledoux
State of Louisiana, Department of Justice

Edward F. Wegmann

Carl Barbier

Attorneys for Defendants

BOYLE, District Judge:

On February 15, 1980, plaintiff filed a civil rights suit in this Court seeking,

inter alia, a temporary restraining order and a preliminary injunction permitting her to sit for the Louisiana State Bar examination, which examination the Louisiana Supreme Court twice denied her the right to take. Record, Doc. 1. Plaintiff's application to take the February, 1980, Louisiana Bar Examination had been rejected by the Committee on Bar Admissions on the ground that Mrs. Tucker, a lawyer trained in Great Britain, could not satisfy the requirements of then Article XIV, Section 7(B)(d) to the effect that "each applicant must produce satisfactory evidence that applicant is...[a] graduate of a law school that is approved by the American Bar Association." Record, Doc. 1, Exhibit C-1; LSA-R.S. 37: Ch.4, Appendix, Articles of Incorporation of the Louisiana State Bar Association, Article XIV, Section 7(B)(d), which requirements had been adopted by the Louisiana Supreme Court to

govern all admissions to the bar. Rule XVII, Supreme Court, 8 LSA-R.S., Supplement. Plaintiff then filed a petition with the Louisiana Supreme Court, invoking the court's original and exclusive jurisdiction, seeking an order "permitting her to take the February, 1980 Louisiana State Bar Examination and, contingent on passing same,... [that] she be certified for admission to the Louisiana State Bar Association and the Supreme Court of the State of Louisiana." Record, Doc.1, Exhibit C-1. Her application was denied, with Chief Justice Dixon and Justices Calogero and Dennis dissenting from the denial. *Application of Tucker*, 381 So.2d 1203 (La. 1980). Mrs. Tucker then petitioned the Louisiana Supreme Court for a rehearing of her application. Record, Doc.1, C-2. The Court denied reconsideration and, again, Chief Justice Dixon and Justices Calogero and Dennis dissented from the denial. *In*

re Tucker, 380 So.2d 86 (La. 1980).

On February 20, 1981, the defendants in the instant case filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Record, Doc. 7. We denied both the defendants' motion to dismiss and plaintiff's motion for a temporary restraining order and a preliminary injunction. Record, Doc. 10. In an interlocutory appeal the Fifth Circuit granted, on February 23, 1980, plaintiff's application for a temporary restraining order and motion for a preliminary injunction, but only to the extent that she be allowed to sit for the examination. Thereafter, on March 28, 1980, the Fifth Circuit granted defendants' motion "to stay further proceedings in this court pending trial on the merits in the [district court] or on such other matters as may properly come before that court;" thereby,

retaining jurisdiction of the matter. Record, Doc. 11.

On April 6, 1981, we granted plaintiff's motion for summary judgment, but only insofar as it sought a declaration that in the event plaintiff passed the bar exam she would be permitted the opportunity to prove the equivalence of her training to that obtained at an American Bar Association (ABA) approved school. Record, Doc. 53. Plaintiff passed the examination. Thereafter, a commissioner appointed by the Louisiana Supreme Court held an evidentiary hearing, concluded plaintiff's credentials were the substantial equivalent of graduation from an ABA accredited law school and recommended she be admitted to practice law in this state. The Louisiana Supreme Court then adopted the commissioner's recommendation and ordered plaintiff admitted to the Louisiana Bar. *Application of Tucker*, 405 So.2d 506 (La.

1981).

Upon receiving the order of the Louisiana Supreme Court that she be admitted to the bar, Mrs. Tucker moved in the instant suit for an award of attorney's fees and other costs. Thereafter, on July 27, 1981, defendants filed nearly identical motions to reconsider motions to dismiss the pending proceedings for lack of subject matter jurisdiction in this court and the Fifth Circuit. Record, Doc. 86. The motion was filed in both courts because of the peculiar procedural posture of the case at that time. The Fifth Circuit declined to rule on the motion and remanded the case to us for consideration and determination of defendant's motion to dismiss for want of subject matter jurisdiction, plaintiff's motion for attorney's fees and "some issues not previously presented to [us] and others that may warrant review in light of *Kremer v. Chemical Construction*

Corp., 50 U.S.L.W. 4487 (U.S. May 17, 1982), and *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)." Record, Doc. 95.

I. SUBJECT MATTER JURISDICTION

A challenge to a federal court's subject matter jurisdiction may be raised at any time. *See, City of Kenosha v. Bruno*, 412 U.S. 507, 511-515, 93 S.Ct. 2222, 2225-2227, 37 L.Ed.2d 109 (1973); 1 Fed. Proc., L.Ed. §1:8 (1981); Wright & Miller, Federal Practice and Procedure: Jurisdiction §3522.

Defendants contend the district court is without jurisdiction to entertain plaintiff's §1983 suit because the suit represents an effort to obtain review of a judicial determination of the Louisiana Supreme Court, in a lower federal court, contrary to the allocation of judicial power set forth in 28 USC §1257(3) granting the United States Supreme Court origi-

nal jurisdiction over such challenges. Under 28 USC §1257(3), the United States Supreme Court has original jurisdiction to review, by writ of certiorari, "final judgments or decrees rendered by the highest court of a state in which a decision could be had...where any title, right, privilege or immunity is specially set up or claimed under the constitution...of...the United States."

Recently the United States Supreme Court rendered its decision in *District of Columbia Court of Appeals, et al v. Marc Feldman and Edward J. Hickey, Jr*, __ U.S. __, 103 S.Ct. 1303, (1983), addressing the very jurisdictional issue now before us. In the *Feldman* case, two individuals, Feldman and Hickey, separately petitioned the District of Columbia Court of Appeals[1/] for a waiver of Rule 46I of the

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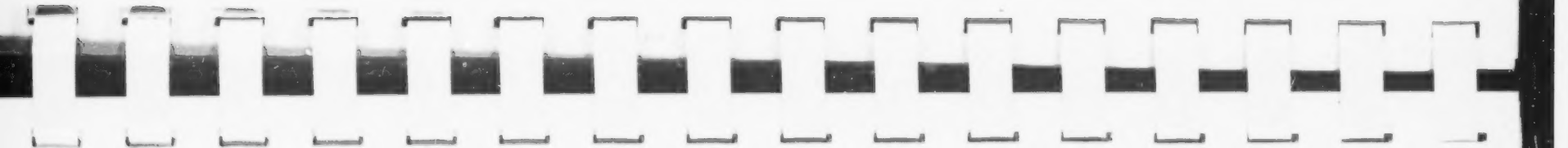
1/ The District of Columbia Court of Appeals has the status of a state Supreme Court. See, 28



General Rules of the Court, which rule was adopted by that court in 1973 and governs admission to the bar of the District of Columbia. In particular, the plaintiffs sought to avoid the requirement of Rule 46I(b)(3) that an applicant be graduated from a law school approved by the American Bar Association. In each case, the District of Columbia Court of Appeals denied the petition to waive the provisions of the Rule. Thereafter the two separately filed complaints in the United States District Court for the District of Columbia challenging the refusal of the District of Columbia Court of Appeals to waive Rule 46I(b)(3) on their behalf. The Federal District Court in each instance granted the defendants' motion to dismiss for lack of subject matter jurisdiction on the ground that the denials of admission by

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U.S.C. §1257; *Key v. Doyle*, 434 U.S. 59, 64, 98 S.Ct. 280, 283, 54 L.Ed.2d 238 (1977).

the District of Columbia Court of Appeals were "'the exercise of a judicial function which may be reviewed only by the United States Supreme Court.'" *Feldman*, __ U.S. __, 103 S.Ct. at 1308, 1310. On appeal to the United States Court of Appeals for the District of Columbia Circuit, the dismissals of the constitutional claims were reversed.[2/] The Circuit Court concluded the "waiver proceedings in the District of Columbia Court of Appeals were not judicial'" and thus the District Court was not foreclosed from considering the constitutional contentions.

On certiorari to the United States Supreme Court, that Court first reaffirmed

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2/ The Circuit Court, however, affirmed the dismissals of Hickey's and Feldman's antitrust claims on the ground that they were insubstantial. In the instant case, Mrs. Tucker has never claimed, either in state court or here, that the defendants' rejection of her application to sit for the bar examination because she did not graduate from an approved law school violated federal antitrust laws.

the doctrine enunciated in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), that only the United States Supreme Court has authority, under 28 U.S.C. §1257, to review final determinations in judicial proceedings of the highest state court. The threshold question thus, was "whether the proceedings before the District of Columbia Court of Appeals were judicial in nature." *Feldman*, __ U.S. __, 103 S.Ct. at 1311. The Supreme Court concluded, after a lengthy discussion of the applicable standard, that the proceedings on Feldman's and Hickey's petitions were judicial and, thus, susceptible to judicial review. This determination, however, did not dispose of the case. The second step in the analysis was whether Hickey and Feldman had mounted a general challenge to the rule.

The Supreme Court, citing *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), stated:

"The Tenth Circuit Court of Appeals ...properly emphasized the distinction between general challenges to state bar admission rules and claims that a state court has unlawfully denied a particular applicant admission. We have recognized that State Supreme Courts may act in a non-judicial capacity in promulgating rules regarding the bar. See, e.g., *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980); *Lathrop v. Donohue*, 367 U.S. 820, 827 (1961)(plurality opinion); *In re Summers*, 325 U.S. 561, 566 (1945). Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States District Court to review a final state court judgment in a judicial proceeding. Instead, the District Court may simply be asked to assess the validity of a rule promulgated in a non-judicial proceeding. If this is the case, the District Court is not reviewing a state court judicial decision. In this regard, 28 U.S.C. §1257 does not act as a bar to the District Court's consideration of the case and because the proceedings giving rise to the rule are non-judicial the policies prohibiting United States District Court review of final state court judgments are not implicated. United States District Courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case. They do

> not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. 28 U.S.C. §1257." *Feldman*, __ U.S. __, 103 S.Ct. at 1316-1317.

Applying this standard to the claims raised by both Hickey and Feldman, the Supreme Court concluded the District Court did not have jurisdiction over those claims "that the District of Columbia Court of Appeals acted arbitrarily and capriciously in denying their petitions for waiver and that the court acted unreasonably and discriminatorily in denying their petitions in view of its former policy of granting waivers to graduates of unaccredited law schools..." *Feldman*, __ U.S. __, 103 S.Ct. at 1317. These allegations, the Court reasoned, were "inextricably intertwined" with the judicial determination of the District of Columbia

Court of Appeals to deny the petitions of Hickey and Feldman. The Court further concluded that District Courts did, however, have subject matter jurisdiction over those elements of the complaints constituting a general attack on the constitutionality of the Rule.

Applying the test articulated in *Feldman* to the instant case, we turn first to the threshold inquiry of whether the Louisiana Supreme Court's denials of Mrs. Tucker's Petition and Petition for Rehearing constituted judicial proceedings within the meaning of 28 U.S.C. §1257. This inquiry, whether "a particular proceeding before another tribunal was truly judicial", is a question of federal law[3/] and, under federal law, "[t]he form of the proceeding is not significant. It is the na-

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3/ *Feldman*, __ U.S. __, 103 S.Ct. at 1311 n.13; *In re Summers*, 325 U.S. 561, 566, 65 S.Ct. 1307, 1310-1311, 89 L.Ed.2d 1795 (1945).

ture and effect which is controlling." *In re Summers*, 325 U.S. 561, 566, 65 S.Ct. 1307, 1311, 89 L.Ed.2d 1795 (1945). The Supreme Court in *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 2d 150 (1908), explained the distinction between judicial and administrative, ministerial or legislative proceedings.4/

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing

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4/ *Prentis* involved a prayer for injunctive relief based on a constitutional challenge by a railroad to rail passenger rates set by the State Corporation Commission of Virginia, which body was clothed with legislative, judicial and executive powers. 211 U.S. at 224, 29 S.Ct at 68. Relying on the grant of judicial power to the Commission, the defendants argued the Commission had acted as a court of the state in promulgating the rates and, thus its order was immune from a lower federal court's injunction under the Anti-Injunction Act. *Id.* at 223, 29 S.Ct. at 68. The United States Supreme Court held, however, that the federal court could enjoin implementation of the rate because the Commission had acted in a legislative as opposed to a judicial capacity in setting the rates. *Id.* at 226-228, 29 S.Ct. at 69-70.

> conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." 211 U.S. at 225, 29 S.Ct. at 69.

Thus, only those orders which are found to declare or enforce existing rights or liabilities rise to the level of judicial action.

The *Summers* court further clarified this distinction between judicial and ministerial action by a court in a case also involving a constitutional challenge to a State Supreme Court's refusal to admit an applicant to the practice of law. In *Summers* the Illinois Supreme Court regarded bar admission proceedings as ministerial not judicial, and, on this basis, contested the certiorari jurisdiction of the Supreme Court, claiming no case or controversy therefore existed in that Court under Article III of the United States Constitution. The Supreme Court rejected the state court's characterization and proceeded to

"appraise the circumstances of the refusal." The Illinois Supreme Court had taken sufficient cognizance of the merits of the claimant's petition to sustain the unfavorable decision of the Committee on Character and Fitness. Although no entry to this effect was placed by the Clerk of Court upon any file, docket or roll, an order was passed and validated by the signature of the presiding officer. The Court then concluded,

> "[w]here relief is thus sought in a state court against the action of a committee, appointed to advise the court, and the court takes cognizance of the complaint without requiring the appearance of the committee or its members, we think the consideration of the petition by the [State] Supreme Court, the body which has authority itself by its own act to give the relief sought, makes the proceeding adversary in the sense of a true case or controversy.
>
> "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When a claim is made in a state court and a denial of the right is made by judicial order, it is a case

> which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court."

325 U.S. at 567-569, 65 S.Ct. at 1311-1312.

Of importance to the Court in *Feldman* was the nature of the inquiry made by the highest District of Columbia Court in assessing the petitions of Feldman and Hickey. The contentions raised by Feldman in his petition to the District of Columbia Court of Appeals were all made against the background of an existing rule. He emphasized the equivalency of his legal training and experience and the Court's former practice of granting waivers to graduates of unaccredited law schools. "In essence, Feldman argued on policy grounds that the rule should not be applied to him because he had fulfilled the spirit, if not the letter, of Rule 46I(b)(3). Alternatively, he argued...the rule was invalid." *Feld-*

man, __ U.S. __, 103 S.Ct. at 1314. These assertions required the Court "to determine in light of existing law and in light of Feldman's qualifications and arguments whether Feldman's petition should be granted." *Id.*

Hickey also sought a waiver of the "ABA accreditation" rule arguing, in part, he was substantially qualified to sit for the bar examination and he had relied on the court's former policy of granting waivers to graduates of unaccredited law schools. "As in Feldman's case, Hickey's petition called upon the District of Columbia Court of Appeals to consider policy and equitable arguments in deciding whether to waive the rule." *Id.*

Despite plaintiff's attempt to distinguish our case from *Feldman* we find the Tucker proceedings before the Louisiana Supreme Court to be similar in all material respects to those of Hickey and Feldman

before the District of Columbia Court of Appeals. Mrs. Tucker relied on the Louisiana Supreme Court's prior practice of granting wavers of the rule to foreign trained applicants. She also sought to establish the equivalency of her legal training to that received by a graduate of an ABA accredited school by describing in detail her legal training and experience and providing comparisons of her legal education with that obtained by other foreign trained applicants who had been granted waivers of the rule. In short, Mrs. Tucker argued she possessed the requisite education and training necessary to qualify her to sit for the bar examination. As with Hickey and Feldman, the highest state court was "required to determine if [Mrs. Tucker's] qualifications and background fulfilled the basic purposes of the rule sufficiently to justify a waiver and, if not, whether equitable

considerations compelled a waiver." *Id.*

Mrs. Tucker did not claim, as did Feldman or Summers, a present right to be actually admitted to the bar of the state. Instead, she claimed, as did Hickey, a right to sit for the bar examination. There is no difference in principle, however, between a claim of a present right to admission to the bar, on one hand, and a claim that an applicant is presently qualified to take the bar examination. This position has been approved implicitly by the United States Supreme Court in *Application of Stolar*, 401 U.S. 23, 27, 91 S.Ct. 713, 715, 27 L.Ed.2d 657 (1971). In *Stolar*, the Court, without discussion of the "case or controversy" requirement, reviewed and reversed on First Amendment grounds the judgment of the Ohio Supreme Court approving the decision of the full Committee on Admission of the Ohio Bar that Stolar's application to take the bar

examination be denied. Accordingly, we conclude plaintiff's claim that she was entitled, at that time, to be admitted to the bar examination, and, contingent upon passing the examination, to be admitted to the bar of Louisiana, constitutes "a claim of a present right to admission to the bar of a state" within the intendment of *Summers*. We further conclude that, although the proceedings on Mrs. Tucker's behalf before the Louisiana Supreme Court "did not assume the form commonly associated with judicial proceedings," these proceedings were judicial in nature and effect and the Louisiana Supreme Court's denial of plaintiff's application was an adjudication on the merits of her claims of a right to sit for examination and for admission. *Feldman*, __ U.S. __, 103 S.Ct. at 1314.

Having determined the proceedings on Mrs. Tucker's petition before the Louis-

iana Supreme Court were judicial, we must now decide by applying the *Doe v. Pringle* test adopted in *Feldman* which claims, if any, raise a general challenge to the constitutionality of Rule XVII of the Rules of the Supreme Court of Louisiana, adopting the requirements of Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association. A constitutional challenge to a state's general rules and regulations governing admission to the bar are cognizable in a lower federal court, but review of a state court's final judgment in a bar admission matter is available only in the United States Supreme Court.

A close reading of the complaint reveals Mrs. Tucker mounted a general challenge to the constitutionality of the ABA accreditation rule, and its administration, and also sought review of the decision of the Louisiana Supreme Court in her

particular case. Her complaint presents the following constitutional issues:[5/]

1. Whether the state's accreditation rule (Rule 14 of the Rules of the Supreme Court of the State of Louisiana, incorporating by reference Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association, La.R.S. 37:Chap 4, App.), as applied to foreign trained candidates for admission to the practice of law in Louisiana, is facially constitutional or inherently violative of such candidates' rights of due process, equal protection and travel? Pet., ¶¶10, 11; Br., pp.3-12; Pet.Reh., ¶14; Compl., preamble, ¶¶IX, XI, XII, XIV, prayer ¶5.

2. Whether the state's failure to promulgate definitive education standards applicable to foreign trained candidates for admission to the practice of law in Louisiana infringes their rights of due process? Pet. Reh. ¶12; Compl., preamble, ¶XIII, prayer ¶5.

3. Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment oblige the state to accord the same privilege of

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5/ The state court pleadings were appended to and incorporated by reference in the complaint filed in this court. Record, Doc. 1 at pp. 3, 4 & 8.

taking the Louisiana State Bar Examination to the plaintiff as was accorded to others "similarly circumstanced"? Pet., ¶9, Br., pp. 3-4. 10-11; Pet. Reh., esp. ¶13; Compl., preamble, ¶¶XII-X, XII, XIV, prayer ¶1.

4. Whether the procedures employed for the determination of "substantial equivalence" in *Anderson* and, hence, prospectively applicable to the plaintiff and other foreign trained candidates for admission to the practice of law in Louisiana, are constitutionally permissible or violate such candidates' rights of due process, equal protection and travel? Br., pp. 8-10; Compl., preamble, ¶X, prayer ¶5.

5. Whether the proceedings before the state court violated the plaintiff's rights of procedural due process? Compl., preamble, ¶5.

6. Whether the state's failure to promulgate definitive standards governing the exercise of its waiver powers violated the plaintiff's and other foreign trained candidates' rights of due process and equal protection? Compl. preamble, ¶¶IV, XII, prayer ¶5.[6/]

6/ Record, Doc. 101, Supp.4, pp.1-3. We are not here confronted with the case where a plaintiff may have forfeited the right to obtain review of a

We conclude that Issues No. 1 and 3

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state court decision in any federal court because she failed to raise her constitutional claims in state court. *See, Feldman*, __ U.S. __, 103 S.Ct. 1315 n.16; *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 1162 (1969). Mrs. Tucker concedes that issues No. 1 through 4 in the text were presented to both this court and the Supreme Court of the State of Louisiana. She argued however, at a time when *Dasher v. Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981), was considered controlling that issues No. 5 and 6 were not presented to the state court. Record, Doc. 101, Supp.4, pp. 1-3.

Both of these issues were, however, presented to the Louisiana Supreme Court. With regard to issue No.5, at page 9 of the Petition for Rehearing, plaintiff stated:

> "Petitioner submits that the rejection by this Court's Committee on Bar Admissions of Petitioner's Application to Take Bar Examination and, subsequently this Court's ruling of February 8, 1980, are violative of Petitioner's rights under the Federal and State Constitutions. As the United States Supreme Court has stated: 'The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character.' *Baird v. State Board of Arizona*, 401 U.S. 1, 9, 91 S.Ct. 702, 707, 27 L.Ed.2d 639, 648 (1971)."

We find Mrs. Tucker's contention that the proceedings before the state court violated her rights of procedural due process was included in this broader claim asserted in the Louisiana Supreme Court.

Although plaintiff sets forth issue No.6 as an issue separate and distinct from issue No.3, a reading of the complaint's preamble, paragraphs IV and XII of the complaint and paragraph 5 of the prayer reveals plaintiff is merely reiterating her

constitute general constitutional challenges to Rule XVII of the Rules of the Supreme Court of the State of Louisiana, incorporating by reference Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association. La.R.S. 37: Chap.4, Appendix (1982). A determination of these issues does not necessarily require review of a state court's judicial decision in a particular case. We are asked only "to assess the validity of a rule promulgated in a non-judicial proceeding." *Feldman*, __ U.S. __, 103 S.Ct. 1316-1317.

Defendants do not argue that the Rules

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contention that she, and others similarly situated, without reason, have been accorded unequal treatment. Thus, issue No.6 is, in substance, no different from plaintiff's issue No.3, which plaintiff concedes was presented to the Louisiana Supreme Court. Therefore, we find plaintiff presented to the Louisiana Supreme Court the very same federal constitutional claims she is now asserting in this federal district court, and these claims were considered and decided by the state court.

of the Louisiana Supreme Court governing admission to the state bar were promulgated in "judicial" proceedings; nor could they successfully make such an argument. The Rule here in dispute, which has now been amended, was adopted by the Louisiana Supreme Court in its rule making capacity on the commendation of the Louisiana State Bar Association LSA-Const. Art.5, §5(A), (B). The Louisiana Supreme Court has, however, considered the applicability of the rule in individual cases and it is only these determinations which may be considered judicial proceedings. Accordingly, we have subject matter jurisdiction over the two general constitutional challenges raised in Mrs. Tucker's complaint.

The remaining issues are, however, "inextricably intertwined", to use the language of the Supreme Court in *Feldman*, __ U.S. __, 103 S.Ct. 1317. The fact that these claims also allege that the state

court's action was unconstitutional is not sufficient to confer jurisdiction on this court. "Review of [these claims] may be had only in the United States Supreme Court." *Id.* We, therefore, do not have jurisdiction over these elements of Mrs. Tucker's complaint.2/

Accordingly, we conclude defendants' motion to reconsider the motion to dismiss for lack of subject matter jurisdiction should be granted. Our reconsideration of the motion to dismiss, leads us to conclude that said motion should be denied with regard to those elements of the

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2/ Even if we were to determine we did have jurisdiction over these remaining issues, we would have to conclude these issues are now moot. Mrs. Tucker was allowed to sit for the state bar examination, which she passed. She was then afforded an equivalency hearing wherein she established that her credentials were the substantial equivalent of graduation from an ABA accredited law school. Following this determination, Mrs. Tucker was ordered admitted to the Louisiana Bar. Because Mrs. Tucker obtained the very relief she sought these issues are now moot. *See, Golden v. State Board of Law Examiners*, 614 F.2d 943, 944 (4th Cir. 1980).

plaintiff's complaint that involve a general challenge to the constitutionality of the rule here in dispute, but should be granted in all other respects.

Because we find we have jurisdiction over two of the claims raised by Mrs. Tucker, in particular, over her constitutional challenges to the State's accreditation rule and to the State's failure to promulgate definitive educational standards applicable to foreign trained candidates, we must now determine whether these challenges present justiciable claims.

II. MOOTNESS

The Louisiana State Bar Association has changed the rule for admission to the state bar applicable to foreign trained applicants. Rule XVII, Rule of the Supreme Court of Louisiana and Section 7(B)(4) and Section 8 of Article XIV of the Articles of Incorporation of the Louisiana State

Bar Association. (See Appendix A). The requirements for admission were amended as of May 27, 1982, to provide that a graduate of a law school outside the United States may apply to sit for the bar examination upon furnishing a certificate of equivalency. Procedures for obtaining such a certificate are set forth in Section 8 of Article XIV of the Articles of Incorporation.

The amended rule alleviates the abuses claimed by the plaintiff. There is no evidence that the prior rule retains some continuing force. We will not presume that defendants will violate the terms of the rule they promulgated, which remedy the very complaints directed at the effects of the old rule and the actions of the defendants thereunder - a rule change consideration of which had been directed even prior to the events of this case. *Application of Anderson*, 377 So.2d 1185, 1187 (La.

1980); *See, Independent Voters of Illinois v. Kusper*, 490 F.2d 1126, 1131 (7th Cir. 1974).

Accordingly, neither the rule nor its administration with regard to educational equivalency proceedings for foreign trained applicants, is susceptible to the challenges originally raised by the plaintiff and the relief requested is inappropriate now that the rule is changed. See, *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 414-415, 92 S.Ct. 574, 575-576, 30 L.Ed.2d 567 (1972); *Attwell v. Nichols*, 608 F.2d 228, 230-231 (5th Cir. 1979). We find the plaintiffs general constitutional challenges to Rule XVII of the Louisiana Supreme Court, adopting Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association, have been rendered moot by the amendment of this rule.[2/]

The foregoing considered:

IT IS ORDERED that the defendants' Motion to Reconsider their Motion to Dismiss for lack of subject matter jurisdiction is GRANTED.

IT IS FURTHER ORDERED that the defendants' aforesaid Motion to Dismiss the plaintiff's complaint to the extent that it involves a general challenge the constitutionality of the rule in controversy is DENIED and in all other respects said

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8/ A finding that plaintiff's general constitutional challenges are now moot renders it unnecessary for us to reach the question of whether the doctrine of res judicata forecloses litigation on these elements of the complaint. A cursory review of this issue, however, leads us to conclude that if the question were before us, we would be obliged to find the defendants had waived the affirmative defense of res judicata by failing to timely raise the defense as required by Fed.R. Civ.P. 8(c). *See, Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir. 1976). Furthermore, we would be constrained to find on this record that the parties had not agreed to trial of the issue of res judicata, either by express or implied consent. *See, Combee v. Shell Oil Company*, 615 F.2d 698, 700-701 (5th Cir. 1980) and *Freeman v. Chevron Oil Company*, 517 F.2d 201, 204 (5th Cir. 1975).

Motion is GRANTED.

Because we find that the issues involved in plaintiff's general challenge to the constitutionality of the rule in controversy are no longer justiciable, IT IS FURTHER ORDERED that said claims be dismissed for mootness. *State of Albabama Ex Rel Baxley v. Woody*, 473 F.2d 10, 12-14 (5th Cir. 1973).

Mootness does not, however, automatically preclude an award of attorney's fees. *Lovell v. Alderete*, 630 F.2d 428, 431 (5th Cir. 1980). Accordingly, IT IS FURTHER ORDERED that the Special Master proceed to hear, determine and report on the plaintiff's Motion for Attorney's Fees and Costs pursuant to the Order of Reference dated May 26, 1981.

New Orleans, Louisiana, June 14, 1983.

[Signed: Edw. J. Boyle, Sr.]
SENIOR UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
BOYLE, J.
JULY 6, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION: EJB

O R D E R

After careful consideration of defendant's Motion to Amend Memorandum Opinion and Order as to the Issue of Jurisdiction of this Court over General Constitutional Challenges and their alternative Motion to Certify the Question Pursuant to 28 U.S.C. 1292(b), the memorandum in support thereof and plaintiff's memorandum in opposition to said motions and our memorandum opinion therein and after a further review of *District of Columbia Court of Appeals v. Feldman*, __ U.S. __, 103 S.Ct 1303 (1983),

we have concluded that the defendants' motion and alternative motion should be denied. Accordingly,

IT IS ORDERED that the Motion to Amend and the alternative Motion to Certify are hereby DENIED.

IT IS FURTHER ORDERED that the part of the Court's Memorandum Opinion and Order of June 14, 1983, at page 17, first paragraph, reading as follows:

We conclude that Issues No. 1 and 3 constitute general constitutional challenges to Rule XVII of the Rules of the Supreme Court of the State of Louisiana, incorporating by reference Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association. La. R.S. 37: Chap. 4. Appendix (1982). A determination of these issues does not necessarily require review of a state court's judicial decision in a particular case. We are asked only "to assess the

validity of a rule promulgated in a nonjudicial proceeding". *Feldman*, __ U.S. __, 103 S.Ct. 1316-1317.

be, and it is hereby, corrected to read as follows:

We conclude that Issues No. 1 and 2 constitute general constitutional challenges to Rule XVII of the Rules of the Supreme Court of the State of Louisiana, incorporating by reference Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association. La. R.S. 37: Chap. 4. Appendix (1982). A determination of these issues does not necessarily require review of a state court's judicial decision in a particular case. We are asked only "to assess the validity of a rule promulgated in a nonjudicial proceeding." *Feldman*, __ U.S. __, 103 S.Ct. 1316-1317.

New Orleans, Louisiana, this 7th day of July, 1983.

[Signed Edw. J. Boyle, Sr.
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION "EJB"/5

FINDINGS AND CONCLUSIONS

Plaintiff's motion for attorney's fees and costs was referred to the undersigned as Special Master by the Court's Memorandum Opinion and Order (Record Document 102), which opinion and order also sets forth the pertinent facts, chronology of events and legal conclusions in this matter. A hearing was conducted, transcripts of which have been filed in the record. (Record Documents 134, 138, 142, 144, 145).

For the four attorneys on her behalf in this matter plaintiff seeks attorney's fees of up to $275,884.10 and costs

amounting to $3,758.75 (Record Document 146 at 153). Each of the attorneys submitted affidavits for the record. Elliot G. Snellings, Esq., sought 131 hours (Record Documents 113, 148); Patrick D. Breeden, Esq., sought 9 hours 45 minutes (Record Document 139); Brian J. Waid, Esq., sought 14.10 hours (Record Document 143); Shelby Tucker, Esq., sought 2,104.35 hours at $90.00 per hour, enhanced by a 1.7 multiple, or a total of $321,965.55, and additionally, costs and expenses of $5,617.26 (Record Document 149). Mr. Tucker was lead counsel throughout and testified in great detail at the hearing. For purposes of these findings, it will be Shelby Tucker alone as the person considered to have acted as plaintiff's attorney. The difference in fees and costs set forth in Mr. Tucker's affidavit and in his brief (Documents 149 and 146) is unclear.

At issue here is whether plaintiff is a

prevailing party in these proceedings, entitled to a reasonable attorney's fee under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. The twelve factors set forth in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) and referred to in *Hensley v. Eckerhart*, __ U.S. __. 103 S.Ct. 1933, 1937 (1983) were considered notwithstanding plaintiff's questionable status as a prevailing party.

Time and Labor Required:

Mr. Tucker postulates that all of the approximately 2000 hours he had devoted to this litigation were reasonable, proper and necessary to the successful completion of this matter. A review of the record refutes this. The excessive number of hours that Mr. Tucker has put into this litigation are totally outside the realm of normalcy for a case of this nature and are inordinate. The record is replete with Me-

moranda, oppositions, Motions and other matters submitted by Mr. Tucker in satiating fashion. Mr. Tucker's use of his time has not been entirely reasonable or necessary, but rather profligate in many instances.

Novelty and Difficulty of the Questions:

This case was not unique, nor did it present any more difficult problems than any other constitutional law matter would. Arguably some issues were novel, but certainly not difficult in the true sense of the word. It did not warrant the excesses to which it was subjected.

The Skill Requisite To Perform the Legal Services Properly:

Mr. Tucker was possessed of the requisite skill to have performed the services properly, though his ardentness in representing his wife did have an effect thereon.

Preclusion of Other Employment:

Undertaking this representation did not preclude Mr. Tucker from other employment. Initiallly he was employed as an associate attorney with a large New Orleans firm, Phelps, Dunbar, Marks, Claverie & Sims, and was paid his full salary. There was no showing that subsequent to his departure from Phelps he was in any way precluded.

The Customary Fee and Awards in Similar Cases:

Fees are paid in §1988 cases based not only on the work done, but on the civil rights experience and competence of counsel. Emphasis is placed on the number and quality of civil rights work done previously and the number of years of practice. Awards in this area have varied between $75 and $120 an hour of late to counsel handling civil rights matters, depending on experience. A customary fee in this instance would range between $75 and $90

per hour.

Whether the Fee is Fixed or Contingent:

Any fee herein would be contingent. Mr. Tucker is plaintiff's husband. He testified that he would have undertaken the matter whether he could be awarded a fee or not.

Time Limitations Imposed:

Overall there was no imposition on counsel's time either by the client or by the circumstances. In the initial stages time was, obviously, critical. Mr. Tucker was then employed by Phelps and had their full acquiescence in his undertaking. There was no showing of any subsequent imposition.

The Amount Involved and Results Obtained:

Money damages were not at issue. Plaintiff sought to take the Louisiana Bar examination and within a few days of instituting this suit, via an order from the appellate court, did so. Plaintiff received no relief from the court on her general

constitutional claims. (Record Document 102 at 21). This suit did not cause changes in the Louisiana bar admission rules.

The Experience, Reputation and Ability of Counsel:

Mr. Tucker was inexperienced with civil rights and constitutional litigation. This was his first such case and such inexperience contributed, together with his zealousness in the representation of his wife, to his general inability to move the case in a reasonable and expeditious manner. Mr. Tucker was experienced and competent in admiralty law, his specialization at Phelps, and enjoyed a good reputation in the community.

The Undesireability of the Case:

The case presented no undesireable aspects. Naming justices of the Supreme Court of Louisiana as defendants was merely procedural.

The Nature and Length of the Professional Relationship with the Client:

Mr. Tucker was at all times pertinent to this litigation plaintiff's husband.

To recover an attorney's fee under §1988 a plaintiff must be a 'prevailing party', one who has succeeded on any significant issue in the litigation which achieves some of the benefit the party sought in bringing the suit. *Hensley v. Eckerhart, supra*, 103 S.Ct. at 1939. Implicit in such rationale is jurisdiction of the court to entertain the subject matter. Based on the recent decison of the United States Supreme Court, *District of Columbia Court of Appeals v. Feldman*, __ U.S. __, 103 S.Ct. 1303 (1983), this court dismissed for want of jurisdiction plaintiff's claims seeking review of Louisiana Supreme Court judicial proceedings denying plaintiff permission to take the State bar examination. Obviously, a party is not a prevailng party on a claim when that claim is dismissed for lack of jurisdiction. Just as obviously,

this court cannot award fees, a subsidiary action to the main demand, when it has no jurisdiction over the main demand, even though the pre *Feldman* order of the appellate court gave plaintiff the relief she sought. Defendants have contended non jurisdiction from the start. However, assuming *arguendo* that plaintiff may be entitled to fees because she was allowed to take the bar exam and in fact was admitted to the Louisiana Bar, thus 'prevailing' even though the court later in the light of a subsequent United States Supreme Court decision found no jurisdiction, plaintiff should recover no fee. Mr. Tucker then was employed by Phelps and was paid his full salary. Phelps chose not to bill it, and in fact, considered it to be, in essence, *pro bono* work. Mr. Mitchell, the firm's administrator testified that:

1) Phelps' attorneys are not allowed to have a private practice. (Tr. August 19, 1983, p. 135-36).

2) All legal work done by any Phelps' attorney is billed by the firm. (Tr. August 19, 1983, p. 136).

3) The time for Mrs. Tucker's case was non-billable time. (Tr. August 19, 1983, p. 137-39).

Thus, Mr. Tucker has no right to any fee for that time. Because Phelps has not chosen to bill the time, there is no valid request for that time.

The court did maintain jurisdiction on plaintiff's general constitutional challenges to the State's bar admission rules but granted no relief, declaring them inappropriate in view of the rule changes, moot and no longer justiciable and dismissed them. Achieving partial or limited success would still entitle plaintiff to an attorney's fee for time reasonably expended, the critical factor being the degree of success obtained. *Hensley v. Eckerhart, supra*, 103 S.Ct.at 1946.

Plaintiff contends that she prevailed by informally obtaining the relief sought on

the general constitutional issues, because it was her suit that brought about the change in the foreign trained candidate rule. Her argument is essentially a chronology argument, which does not suffice to make one a prevailing party. Rather, "while the chronological sequence of events is a factor to consider, we agree with the First Circuit that it is clearly not definitive.' *Iranian Students Ass'n. v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir. 1981). The true test is whether the suit was "a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior." *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981). See also *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982) (Causal connection between plaintiff's suit and defendants' action.); *Iranian Students Ass'n. v. Sawyer, supra*, 639 F.2d at 1163 (a causal relationship between the lawsuit

and the relief received.); *Coen v. Harrison County School Board*, 638 F.2d 24, 26 (5th Cir. 1981) (Lawsuit must be a major factor in obtaining relief. Lawsuit must be "if not the sole reason for his success, at least a major factor in bringing it about. A civil rights plaintiff may not collect attorneys' fees for demanding that a state official do what he would have done in any case." at 26).

It is up to the trier of fact to weigh the chronology of events along with all the other relevant evidence to determine whether the suit was the motivating factor in the change effected. *Williams v. Leatherbury, supra* at 551.

Both Mr. John Combe, the Chairman of The Task Force To Revise Bar Admission Rules, and Mr. Thomas Collins, Executive Counsel for the Louisiana State Bar Association and counsel for The Task Force To Revise Bar Admission Rules, testified that the

Commission was formed in response to problems that had arisen over the years since the last rules revision in 1941 as to several of the rules on bar admissions. (Tr. August 18, 1983, 15-20, 78-86). The fact that the Task Force was to consider multiple rule changes and not just the one affecting the Tuckers is confirmed by defendants' Exhibit 2 which includes the 11 page draft of multiple proposed changes to the bar admisson rules. Messrs. Combe and Collins also testified that the rule revision on foreign trained students.

1) was not mandated by any particular litigation

2) was not mandated by the Tucker litigation. (Tr. August 18, 1983, p. 20, 86-87).

Finally, they testified that although the task force was aware of the Tucker litigation, it certainly was not the moving force in the foreign-trained students rule revision and that they would have suggest-

ed the rule change even if there had been no Tucker litigation (Tr. August 18, 1983, p. 20-21, 87-88). Without jurisdiction on her particular claim for admission and having obtained no relief on her general constitutional claims, either formally by court order or informally, plaintiff is not a 'prevailing party' and is not entitled

Additionally, the defendant justices of the Supreme Court of Louisiana and the Court itself enjoy immunity from suit herein for actions taken in their legislative capacity. *Supreme Court of Virginia v. Consumers Union, Etc.*, 446 U.S. 719, 734, 100 S.Ct. 1967, 1976 (1980). This court has held that the Louisiana Supreme Court in adopting the challenged bar admission rule acted in its non judicial or legislative rule making capacity. (Record Document 102 at 17).

Plaintiff dismissed this suit as to the

defendant justices who had not voted against her admissions petition and pursued it against those who had. An attorney's fee award would in effect be a monetary penalty for exercising a judicial function tantamount to damages. It is in the public interest to have judges at liberty to exercise their independent judgment as regards the merits of a matter before them. *Dennis v. Sparks*, 449 U.S. 24, 31, 101 S.Ct. 183, 1988 (1980). Though judges must answer for actions taken in a non judicial capacity with clear absence of jurisdiction, they enjoy immunity otherwise. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967).

Notwithstanding the admonition in *Hensley v. Eckerhart*, *supra*, 103 S.Ct. 1933, 1941 - "A request for attorney's fees should not result in a second major litigation." - it did. Notwithstanding receiv-

ing relief within a few days of the filing of this suit and the subsequent suggestion by the Court, after the change in composition of the Louisiana Supreme court favoring plaintiff's position, that plaintiff re-apply for admission, plaintiff didn't and pursued this case inordinately. Why plaintiff's grief[1] persisted is difficult to understand.

It is, RECOMMENDED that plaintiff's motion for attorney's fees and costs be DENIED.

New Orleans, Louisiana, December 16, 1983.

[Signed Marcel Livaudais, Jr.]
United States Magistrate

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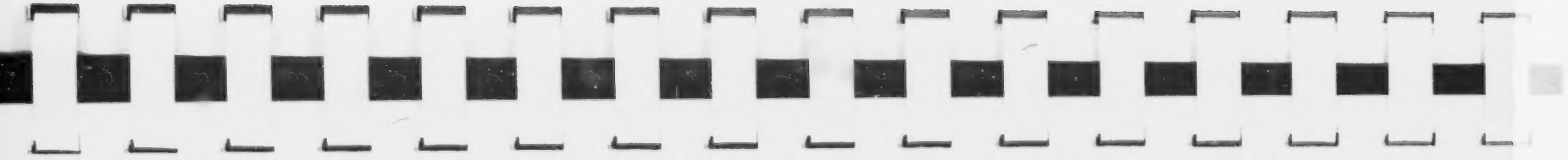
[1] "Every one can master a grief, but he that hath it." Shakespeare, MUCH ADO ABOUT NOTHING, Act iii, Sc. 2



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL.	SECTION "EJB"

MEMORANDUM OPINION AND ORDER

This matter was referred to a Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, for a hearing on plaintiff's motion for attorney's fees as a prevailing party under 42 U.S.C. §1988 and for findings and conclusions thereon. Record Documents 60, 102. The transcript of the hearing conducted by the Master has been filed into the record, Record Documents 134, 138, 142 and the Master has submitted his findings and conclusions, denying plaintiff's motion. Record Document 150. Plaintiff's objections thereto

were received by this court in a timely fashion. Record Documents 151, 152, and a response was filed by State defendants. Record Document 154.

As the facts underlying this controversy have been recited in our prior opinions herein, Record Documents 53, 102, we proceed directly to review the Master's findings and conclusions. The Master began his analysis by weighing the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) for the computation of attorney's fees, notwithstanding what the Master characterized as "plaintiff's questionable status as a prevailing party." Record Document 150 at 2. Although the Master examined each *Johnson* factor, he reached no conclusion thereon. As a preliminary matter, we find no error in the Master's failure to draw any conclusion from his weighing of the twelve *Johnson*

factors, for the Master has put the cart before the horse. As a matter of law, a consideration of the twelve *Johnson* factors is logically posterior to the question of whether plaintiff was a prevailing party. *Hensley v. Eckerhart*, __ U.S. __, 103 S.Ct. 1933, 1939, __ L.Ed.2d __ (1983). Because we affirm the Master's finding that plaintiff is not a prevailing party, we find it unnecessary to reach the *Johnson* factors.

On the central issue as to whether plaintiff qualifies as a "prevailing party", the Master, noting that the "true test" of prevailing party status is whether the suit was "a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior," Record Document 150 at 7 (citing *Robinson v. Kimborough*, 652 F.2d 458, 466 (5th Cir.1981)), ruled that plaintiff

had not prevailed.1/ The Master's reason for this ruling was essentially that

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1/ We explicitly reject plaintiff's argument that such orders as enabled plaintiff to sit for the bar exam and prove the equivalence of her education were relief appropriate to *either* her personal claim for admission *or* her general constitutional attack on the State Bar rule. Record Document 152 at 2-7. In the first place, these orders were not all "unexplained" as plaintiff asserts: in our Memorandum Opinion and Order of April 6, 1981, we found that it was "unnecessary to consider the rule's facial unconstitutionality," Record Document 53 at 4, indicating that such relief as plaintiff received from this court was predicated upon her claim of a present, personal right to sit for the bar exam. Plaintiff's general, constitutional challenge to the State Bar rule was never *considered* by this court before our Memorandum Opinion and Order of June 14, 1983, when her challenge was ruled moot. Record Document 102 at 21.

It should be further noted that, applying *District of Columbia Court of Appeals v. Feldman*, __ U.S. __, 103 S.Ct. 1303, __ L.Ed.2d __ (1983), we held that plaintiff's claim of a present right to sit for the bar exam and to prove the equivalence of her education was "inextricably intertwined" with the Louisiana Supreme Court's judicial resolution of Mrs. Tucker's Petition and Petition for Rehearing, which we were without jurisdiction to review under 28 U.S.C. §1257. Record Document 102 at 9-10, 17-19, 21-22. As a matter of law, plaintiff's status as a prevailing party cannot hinge upon these orders. *Taylor v. Sterrett*, 640 F.2d 663, 669-70 (5th Cir. 1981) (plaintiff did not prevail by virtue of district court's interlocutory orders where Court of Appeals later determined that district court should have declined jurisdiction).

plaintiff's case (which the Master characterized as "essentially a chronology argument" Record Document 150 at 7) was outweighed by defendants' evidence: (1) that the Task Force to Revise Bar Admission Rules was formed in response to problems that had arisen in several areas of bar admissions over a number of years; (2) that the particular rule change at issue herein was not mandated by the instant suit nor by any other particular suit; and (3) that although the Task Force was aware of the Tucker litigation, it was not a substantial factor or significant catalyst for the rule change. Record Document 150 at 8.

In that portion of her lengthy brief directly addressing this issue, plaintiff urges that the Master's findings and conclusions are erroneous because: (1) the State's conduct belies the assertion that the contested rule would have been changed

without the instant suit; (2) the causal nexus between this lawsuit and the rule's revision was admitted in the prior statements of the officers of the Louisiana State Bar Association (LSBA); (3) Thomas O. Collins, executive counsel of the LSBA, has admitted in testimony the causal nexus between this lawsuit and the rule revision; (4) circumstantial evidence of causal nexus is to be found in the "close familiarity" of five of the nine members of the LSBA Task Force with the instant suit; (5) circumstantial evidence of causal nexus is also to be found in the "exact correspondence" between the claims made in this litigation and the rule changes actually made; (6) the chronology of pertinent events establishes the causal nexus between this lawsuit and the rule changes. Record Document 152 at 12-26.

Defendants counter that the Master's findings on the prevailing party issue are

factual in nature and therefore, under FRCP Rule 53, reviewable only under a "clearly erroneous" standard; plaintiff has demonstrated no clear error, contend defendants, and, moreover, the Master's findings are supported by substantial evidence. Record Document 154 at 3-4.

Defendants are correct to draw our attention to the strictures of Rule 53. It is well settled in this circuit that

> The party excepting to the Master's findings carries the burden of proving them to be clearly erroneous...and the court must uphold a finding, even if it is thought to go against the weight of the evidence, unless the error is clear....at the same time, the mere fact that a finding is supported by substantial evidence does not prevent its being overturned if the reviewing court, with due regard for the Master's opportunity to judge credibility, "is left with the definite and firm conviction that a mistake has been committed." *NLRB v. Crockett-Bradley, Inc.*, 598 F.2d 971, 975 (5th Cir. 1979) (*quoting O., C. & Atomic Workers International Union, AFL-CIO v. NLRB*, 547 F.2d 575 (D.C. Cir. 1976) (citations omitted)).

This is the same standard governing an

appellate court's review of a district court's findings of fact. *Id.* "Merely because a reviewing court on the same evidence may have reached a different result will not justify setting a finding aside." *Matter of Multiphonics, Inc.*, 622 F.2d 709, 723 (5th Cir. 1980).

As the standard of review is the same under Rules 52 and 53, decisions of the Fifth Circuit reviewing district court findings on the "prevailing party" issue furnish exact guidance to our review of the Master's findings herein. Of course, a litigant need not obtain a judgment to qualify as a "prevailing party" under Section 1988; a prevailing party is one whose "ends are accomplished as a result of the litigation even without formal judicial recognition." *Williams v. Leatherbury*, 672 F.2d 549, 550 (5th Cir. 1982).

A party could prevail in an out-of-

> court settlement or a defendant might moot the suit by taking unilateral capitulatory action. A plaintiff who attains the sought-after relief by such means "may still recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action and that the defendant's conduct was required by law." *Smith v. Thomas*, __ F.2d __ (Slip Opinion) (5th Cir. Feb. 24, 1984, *quoting Wooten v. Housing Authority of City of Dallas*, 723 F.2d 390, 391 (5th Cir. 1984).

The "prevailing party" issue thus poses two questions, one legal and one factual. *Posada v. Lamb County, Texas*, 716 F.2d 1066, 1071-72 & n.7 (5th Cir. 1983).

The Master has entered no conclusion as to whether defendant's conduct was required by law (i.e., "not a wholly gratuitous response to an action that in itself was frivolous or groundless," *Williams v. Leatherbury, supra*, 672 F.2d at 551); the question is not addressed in plaintiff's otherwise exhaustive brief. We do not find it necessary to remand the matter to the Master for that reason,

however, since we affirm his findings on the factual question of causal nexus, a requirement that is conjunctive with the showing that defendant's changed behavior was legally necessary.

Having reviewed the transcript of the hearing before the Master, together with the documentary evidence adduced at that hearing,[2] and having likewise reviewed the briefs of the parties, we are not left with the definite and firm conviction that a mistake has been made. We are unpersuaded by plaintiff's allegations of error, which go to the weight to be given to the evidence or to credibility choices. We find that the Louisiana Supreme Court's

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2/ Plaintiff notes that at trial the Master reserved ruling on the admissibility of plaintiff's exhibits 49-67, but has yet to rule. We have reviewed these documents, and we now determine that their consideration would not compel a result different from that reached by the Master. His failure to rule on their admissibility therefore constitutes harmless error.

direction that the LSBA consider changing the rule at issue, *Application of Anderson*, 377 So. 2d 1185, 1187 (La. 1980), Record Document 102 at 20 (rule change had been suggested even prior to the events of this case),[3] together with the apparently credible testimony of Thomas O. Collins and John Combe concerning LSBA's motives

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3/ Plaintiff applied to the Supreme Court of Louisiana, Committee on Bar Admissions, for permission to take the Louisiana Bar examination scheduled to be administered on February 25, 1980. Her application was received on January 2, 1980. By letter dated January 28, 1980, from the Chairman of the Committee on Bar Admissions, plaintiff was informed that her application had been rejected because of her inability to satisfy the requirements of Article XIV, Section 7(B)(d) of the Articles of Incorporation of the Louisiana State Bar Association, that all applicants must produce satisfactory evidence that they are graduates of law schools approved by the American Bar Association. On the same day, January 28, 1980, the Louisiana Supreme Court handed down the *Anderson* decision. On February 1, 1980, plaintiff filed a petition in the Supreme Court of Louisiana seeking waiver of the requirement of graduation from an ABA approved law school. The petition was denied without a hearing. On February 12, 1980, plaintiff filed a petition for rehearing in the Supreme Court of Louisiana. That petition was also denied. Plaintiff then filed the present suit on February 15, 1980. Record Document 53 at 1-2.

for the change, are sufficient to support the Master's findings and conclusions. We further note that the mere fact that defendants were *aware* of the instant suit does not compel the conclusion that the suit caused or spurred the rule change plaintiff sought. *Posada v. Lamb County, Texas, supra*, 716 F.2d at 1070.

> Another view of the evidence might well have been taken by the fact-finder. The evidence presented by the plaintiffs might warrant the conclusion that their suit and the efforts incident to it were a major factor in effecting the change, but it neither compels that deduction nor makes the contrary conclusion erroneous. We have neither prescience enough nor warrant to justify reassessing the evidence. *Williams v. Leatherbury, supra*, 672 F.2d at 551.4/

Accordingly, for the foregoing reasons, we find no clear error in and adopt

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4/ The Master has also suggested three "special circumstances" which should bar plaintiff from attorney's fees. The Master would deny fees, even if plaintiff were a prevailing party, because: (1) her challenge to the Louisiana Supreme Court's judicial determination to deny her permission to sit for the bar examination was dismissed for want

as our own the finding of the Special Master that plaintiff was not a prevailing party for the purposes of 42 U.S.C. §1988 and thus does not qualify for an award of attorney's fees.

IT IS ORDERED that judgment be entered herein in favor of defendants and against plaintiff, dismissing plaintiff's suit at plaintiff's cost.

New Orleans, Louisiana, this 10th day of April, 1984

[Signed: Edward Boyle, Sr.]
SENIOR UNITED STATES DISTRICT JUDGE

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of jurisdiction pursuant to *District of Columbia Court of Appeals v. Feldman*, *supra*, note 1/; (2) during the course of the litigation, plaintiff's counsel received his full salary from his law firm which did not allow its attorneys to have an outside practice; and (3) attorney's fees are not recoverable against the defendant Justices of the Supreme Court of Louisiana, who enjoy immunity from suit for actions taken in their legislative capacity, according to the Master's reading of *Supreme Court of Virginia v. Consumers Union, Etc.*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).

As regards the Master's first "special circumstance", this court has already ruled that jurisdiction did lie over plaintiff's general constitutional attack on Louisiana's accreditation rules, and that the mootness of this attack did not automatically preclude an award of attorney's fees. Record Document 102 at 22. This conclusion of the Master's is therefore rejected. As regards the Master's second "special circumstance", we hold that any consideration of salary or work preclusion more appropriately falls under *Johnson* factor (4), i.e., the preclusion of employment by the attorney due to acceptance of the case. As noted above, we do not reach the *Johnson* factors today and therefore find it unnecessary to review the Master's finding on this issue. As regards the Master's third "special circumstance", it appears that as a matter of law, legislative immunity does not necessarily prevent an award of attorney's fees:

> This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. We are not convinced that it would be unfair to award fees against the state bar, which by statute is designated as an administrative agency to help enforce the state bar code. Fee awards against enforcement officials are run of the mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the district court awarded fees not only against the bar *but also against the Virginia court* because of its own direct enforcement role. *Supreme Court of Virginia v. Consumer's Union, etc., supra*, 100 S.Ct. at 1978 (emphasis added).

We therefore reject this conclusion of the Master.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER NO. 80-594

VERSUS CIVIL ACTION

THE HON. FRANK W. SUMMERS, ET AL SECTION "EJB"

J U D G M E N T

Considering the findings and conclusions of Marcel Livaudais, Jr., United States Magistrate for the Eastern District of Louisiana, to whom the issue of attorney's fees was referred as a Special Master pursuant to Rule 53(a) F.R.C.P., and the Court, after due consideration given to the objections to the findings and conclusions filed by plaintiff, Carole Tucker, along with the opposition thereto filed by state defendants, having found that said findings and conclusions with respect to plaintiff's entitlement to attorney's fees are not clearly erroneous and should be accepted pursuant to Rule

53(e)(2), F.R.C.P., and all other issues in the case having previously been disposed of by the court's memorandum opinions of April 6, 1981 and June 14, 1983,

IT IS ORDERED, ADJUDGED AND DECREED that the Special Master's aforesaid findings and conclusions be, and they are hereby, accepted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants and against plaintiff, dismissing plaintiff's suit at plaintiff's cost.

New Orleans, Louisiana, this 10th day of April, 1984.

[Signed: Edw. J. Boyle, Sr.]
UNITED STATES SENIOR DISTRICT JUDGE

X.

Respondent denies the allegations contained in Paragraph 10 of the application, and in further response thereto, avers that the Anderson case was overruled by this Court in the matter entitled "In re: Application of Carole Shelby Carnes Tucker" No. 66745 of the docket of this Court.

XV.

Respondent denies that the requirement of graduation from a law school approved by the American Bar Association is unconstitutional. Such a requirement has been consistently upheld by the Courts as meeting constitutional standards of due process and equal protection. Rosenthal v. State Bar Examining Committee, 165 A. 211

(S.Ct. Conn. 1933); Hackin v. Lockwood, 361 F.2d 499 (9 Cir. 1966); Kadans v. Collins, 441 F.2d 657 (9 Cir. 1971); Hennington v. State Bar of Board Examiners, 291 P.2d 1108...

Respectfully submitted,

LOUISIANA STATE BAR ASSOCIATION

By [Signed: Edward F. Wegmann]
EDWARD F. WEGMANN,
CHAIRMAN
COMMITTEE ON BAR ADMISSIONS

Suite 210, 225 Baronne Street
New Orleans, LA 70112
566-1600

SUPREME COURT OF LOUISIANA

No. 80-O-2214

IN RE: APPLICATION OF JAMES E. SMITH, JR.

O R D E R

Considering the motion of the Louisiana State Bar Association for the appointment of a Commissioner,

IT IS ORDERED that Leonard L. Lockard be appointed Commissioner to determine whether the legal education of James E. Smith, Jr. is the substantial equivalent of one which meets the standards of approval of the American Bar Association.

The Commissioner shall have the same powers as a commissioner appointed under Article 15, Section 6 of the Articles of Incorporation of the Louisiana State Bar Association, and any hearings necessary shall be governed by the provisions of said Section 6 where applicable.

For the Court at New Orleans, Louisiana, this 31st day of October, 1980.

[signed John A Dixon, Jr.]
John A. Dixon, Jr., Chief Justice

Marcus, Blanche and Watson JJ, dissent.

12.

Alternatively,. and only in the event that this Honorable Court should decide to grant Petitioner an exception to the ABA graduation rule then Respondent suggests that the Court should follow the procedure set forth in Application of Faylona, [No. 61,475]; Application of Anderson, [Nos. 62,510 and 64,215]; and Application of James E. Smith, Jr., [No. 80-0-2214], and appoint a commissioner to conduct a hearing for the purpose of determining whether Applicant's legal education is the substantial equivalent of one which meets the standards of approval of the American Bar Association. Further, as ordered in previ-

ous cases, the commissioner should be given the same powers as a commissioner appointed under Article XV § 6 of the Articles of Incorporation of the Louisiana State Bar Association and any hearings necessary should be governed by the provisions of said Section 6 where applicable. See: In re Application of James E. Smith, Jr., order of October 31, 1980.

1981 Report of the Louisiana State Bar Association

REPORT OF EXECUTIVE COUNSEL

...The second equally important work of your office is in support of the Committee on Bar Admissions...The proliferation of law suits in both state and federal courts attacking the constitutionality of certain requirements and procedures have added to the routinely heavy logistical work load. A task force has now been appointed to re-evaluate the present admission rules and procedures to alleviate the problems and to increase the efficiency of the work of the Association...

...

5

Louisiana State Bar Association
225 Baronne Street, Suite 210
New Orleans, Louisiana 70112-1772

Thomas O. Collins, Jr., Executive Counsel...

September 30, 1981

William D. Hawkland, Chancellor
Louisiana State University Law School
Paul M. Hebert Law Center
Baton Rouge, Louisiana 70803

RE: TASK FORCE TO REVISE BAR ADMISSION RULES

Dear Chancellor Hawkland:

Edward F. Glusman, President, has appointed me as chairman of a Task Force to evaluate the present rules of bar admission and to suggest any amendments or changes indicated. One problem that the Task Force has been addressing for the past few weeks is that involving the applicant who has been trained outside the continental limits of the United States...

Jurisprudence has been consistent that the requirement of attendance and graduation from a law school approved by the American Bar Association is valid when

confined to the continental limits of the United States or its territories. However, cases have indicated that a special approach must be provided for students trained in foreign countries....

Yours very truly,

John C. Combe, Jr.
Chairman

Louisiana State Bar Association
225 Baronne Street, Suite 210
New Orleans, Louisiana 70112-1772

Thomas O. Collins, Jr., Executive Counsel...

December 14, 1981

Honorable Chief Justice
and Associate Justices
Supreme Court of Louisiana
301 Loyola Avenue
New Orleans, Louisiana 70112

RE: TASK FORCE ON REVISION OF BAR ADMISSION RULES

Your Honors:

Shortly after Edward F. Glusman assumed the Presidency, he created the above Task Force, appointing the writer as Chairman. Our purpose is to evaluate the present rules governing bar admissions as set forth in Article XIV of the Articles of Incorporation of the Louisiana State Bar Association...

At this time, the Committee has completed the first phase of its work, namely the reevaluation of Article XIV and I...forward to the Court..the draft of amend-

ments and changes to various sections of Article XIV, which have been approved by the Task Force. In doing so, I will outline the reasons for the suggested changes...

Section 7.

This section has been completely rewritten...Starting with the Lendais case and down through the recent cases of Tucker and Smith, the Court has been burdened with the appointment of commissioners, the holding of hearings, and the issuance of decrees, based upon individual applications...[T]he provisions set forth under Section 7 and the following Section 8 afford...a procedure to handle most of the cases involving graduates from law schools outside of the United States or its possessions...

Section 8

Section 8 is an entirely new section. The provisions of Section 8 have, as their

purpose, the formulation of a panel made up of representatives from the law schools in Louisiana as a panel of equivalency... The Court's attention is drawn to the fact that in the recent Tucker case, the commissioner appointed by the Court referred the matter to Mr. John McAulay, Acting Dean of Loyola, for his opinion as to the equivalency of the applicant's education. Section 9.

This section is also a new section... Article XIV formerly had no provisions of this nature and when these problems did arise, the Supreme Court adopted the provisions of Article XV, covering disciplinary actions, for use in disposing of the matter under bar admissions. In one of the recent cases handled in this matter, there was an objection to the use of "disciplinary proceedings" for a bar applicant's petition and appeal...

Respectfully submitted,

John C. Combe, Jr.
Chairman

Art. 14, §8 (C), Articles of Incorporation, Louisiana State Bar Association, La.R.S. tit. 37, ch. 4, App.:

> The panel so selected shall hold a hearing within sixty (60) days of the notice of their selection to allow the applicant and the Committee to provide and produce any and all evidence concerning the equivalency of the applicant's education. A record of this hearing shall be made and placed in applicant's record. Within thirty (30) days from the receipt of the transcript of the hearing, the panel shall file its report with the Committee indicating whether or not, in its opinion, the legal education of the applicant is equivalent to that of the legal education offered in the United States or its territories by a law school approved by the American Bar Association.

JOHN C. COMBE, JUNIOR, called as a witness at the instance of the defendant, having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. TUCKER:

Q. ...Would you examine the list of accreditation waiver cases which I just put before you...how many cases on this list, starting with Henri Lendais at the top and concluding with the Application of Scott at the bottom, were you familiar with?...

THE WITNESS:

The names Lendais and Faylona ring a bell simply because I've heard them mentioned. Tucker rings a bell because of these proceedings and the fact that I found out I'm going to testify in this case. I know nothing of the facts surrounding those three cases that I feel competent to testify definitely this is

the situation that existed in any of these cases. The others on here are simply names....

Q. How did you become aware of these cases then?

A. You handed me the sheet just about five minutes ago...I'm not familiar with these cases, sir.

Q. Well, how did you become familiar with the problem of the accreditation rule?

A. That was one of many problems that the committee was asked to address...It was included on the agenda of the original task force meeting...

Q. Who prepared the agenda...?

A. For the initial meeting? It would have been Mr. Collins...

THOMAS O. COLLINS, JUNIOR,, called as a witness at the instance of the Defendants, having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MRS. BOWERS:

Q. Mr. Collins, who was the sponsoring agency for the task force?

A. The Bar itself, the Louisiana State Bar...

BY MR. TUCKER:

Q. Would the rule have been under consideration for change if there had been no Tucker litigation?

A. I would say yes but that's definitely a guestimation...

Q. The question is did the Bar Association want to change the rule?...

THE WITNESS:

I can't speak for the Bar Association as such.

THE COURT:

That answers the question.

BY MR. WAID:

Q. At the time that you drafted that agenda, Mr. Collins, isn't it correct that you were aware of the Tucker proceedings?

A. Yes, sir.

Q. ...Isn't it also correct that you drafted the proposed amendments to the accreditation rule?

A. I drafted all the amendments.

Q. And isn't it correct that, at the time you drafted those amendments, you were aware of the Tucker proceedings?

A. Yes, sir.

Q. You referred to...discussions...over the years prior to the task force being ...created. With whom were those discussions?

A. Members of the bar admissions committee, members of the Board of Governors, associate counsel, members of the Bar in general.

Q. Is it fair to say, Mr. Collins, that, prior to the creation of the task force, ...those discussions had not resulted in any change in the accreditation rule?...

A. There were no changes until the October rule, no.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION D

PLAINTIFF'S SECOND SET OF INTERROGATORIES

....

16. Please describe the efforts made, identifying all persons employed in such efforts, to implement the recommendation of the defendant Court in Application of Anderson, 377 So.2d 1185 (La. Sup. Ct. 1980), at p. 1187, that "the proper rule-making committee...study whether the rule" [governing admission to practice law in this State] "should be changed" and describe in detail all recommendations for change made by that committee...

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROLE SHELBY CARNES TUCKER	NO. 80-594
VERSUS	CIVIL ACTION
THE HON. FRANK W. SUMMERS, ET AL	SECTION D

DEFENDANTS' ANSWERS TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

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16. Edward F. Wegmann, Chairman of the Committee on Bar Admissions, is in the process of drafting a suggested method of handling applications from foreign-trained attorneys; however, he has not reached any definite conclusions as of this date as to what procedures will be recommended to the Board of Governors, the House of Delegates and the Supreme Court of Louisiana...

PERTINENT STATUTES

United States Constitution, Amendment V:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law...

United States Constitution, Amendment XIV:

> SECTION 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Constitution, Article III:

> The judicial power of the United States shall be vested...in such inferior courts as the Congress may..establish. The judges...shall hold their offices during good behavior...The judicial power shall extend to all cases..arising under this Constitution [and] the law of the United States...

FRCP 53(a):

> A reference to a master shall be the exception and not the rule. In

actions to tried...without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

FRCP 53(d)(1):

It is the duty of the master to proceed with all reasonable diligence...

FRCP 53(e)(2):

[T]he court shall accept the master's findings of fact unless clearly erroneous...

28 U.S.C. § 636(b):

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b).

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

28 U.S.C. § 1257:

Final judgments...rendered by the highest court of a State in which a decision could be had, may be re-

viewed by the Supreme Court...

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution ...or laws of the United States...

(3) By writ of certiorari, where ...any title, right, privilege or immunity is specially set up or claimed under the Constitution...or statutes of...the United States.

28 U.S.C. § 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy...arises under the Constitution [or] laws of the United States...

28 U.S.C. § 1343:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:...

(3) To redress the deprivation, under color of any State law...any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. § 2201:

In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may

declare the rights and other legal relations of any interested party seeking such declaration...Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C. §1988:

In any action or proceeding to enforce a provision of [42 U.S.C §] 1983...the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs.